IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-60

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DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS and MARK WHITE, SECRETARY OF STATE OF TEXAS,

Petitioner

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL,

Respondents

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The Petitioners, Dolph Briscoe, Governor of the State of Texas, and Mark White, Secretary of State of Texas, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this cause on April 19, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported; however a copy is appended hereto as Appendix "A". The opinion of the United States District Court for the District of Columbia is not reported; a copy of the

decision, which was delivered orally, is attached as Appendix "B", together with the Court's written order granting summary judgment against Petitioner-Plaintiffs.

JURISDICTION

The opinion of the Court of Appeals was entered on April 19, 1976, (See Appendix "A"). A copy of the judgment of that Court is attached as Appendix "C".

This Court's jurisdiction is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

1. Whether the Voting Rights Act of 1965 was improperly construed and interpreted by the Bureau of the Census, the Attorney General of the United States, the federal District Court and the Court of Appeals so that the State of Texas was erroneously determined to be subject to the Act?

2. Whether the Voting Rights Act of 1965, as construed and interpreted, is "appropriate legislation" to enforce and protect the privileges and immunities guaranteed by the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voting Rights Act of 1965, as amended, codified as 42 U.S.C., §1973, et seq., is involved and forms the central core around which revolve the questions and issues presented by this Petition. The pertinent sections of the Act, as they affect this cause, are set out in the body of the Petition where relevant to Petitioner's contentions.

The Tenth and Fourteenth Amendments to the

United States Constitution are peripherally involved and are mentioned and discussed where pertinent to Petitioner's argument.

STATEMENT OF THE CASE

The Voting Rights Act of 1965, Public Law 89-10, as amended by Public Law 91-285 [42 U.S.C. §1973 et seq.] applied certain sanctions to those states or political subdivisions found to be within its coverage. The test, stated in Section 4(b) was as follows:

> "The provisions of subsection (a) shall apply in any State or any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determined that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964. . . . . "

The Act did not apply to the State of Texas under that test.

The 1975 amendments to the Voting Rights Act of 1965 (Public Law 94-73) added to Section 4(b) the following additional language:

> "On or after August 6, 1975, in addition to any state or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972 any test or

device and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the presidential election of November, 1972."

The 1975 amendments also added Section 4(f)(3) as follows:

"In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process including ballots, only in the English language where the Director of the Census determined that more than 5 per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. . . . ."

Thus, before the Voting Rights Act of 1975 might be deremined to be applicable to the State of Texas, it was necessary that a number of determinations be made by the Attorney General or the Director of the Census including:

(a) That five percent of the State's citizens were members of a single language minority;

(b) That the State had a "test or device" which inhibited minority voting with voting procedures and voting materials produced only in the English language; and

(c) That the Director of the Census determine that

less than fifty per centum of the citizens of voting age were registered on November 1, 1972 *or* that less than fifty per centum of such persons voted in the presidential election of November, 1972.

Texas has not contested that the first of the conditions is met since Texas has, prior to the amendment of the Voting Rights Act of 1975, adopted legislation calling for bi-lingual materials in elections in any of its counties in which five percent or more of the inhabitants are persons of Spanish origin or descent. [See Senate Bill 165, attached as Exhibit G to the Affidavit of Mark White, attached to Plaintiff's Original Complaint; Appendix to the Briefs on file in the Court of Appeals, page 32, hereinafter refered "C.A. Appendix ____"].

Texas, however, has consistently urged that, if the second and third requirements are properly construed and if proper figures are used, Texas is not covered. The affidavit and the testimony of Appellant White, the chief election officer of the State, shows that as early as July 14, 1975 more than three weeks prior to the effective date of the 1975 amendments, he urged the Director of the Census to grant him a hearing so that proper figures might be used. Other requests were made of the Director of the Census as well as of the Attorney General of the United States. It has been the consistent position of Texas that (1) more than fifth made of the Director of the Census as well as of the Attorney General of the United States. It has been the consistent position of Texas that (1) more than fifty percent of the citizens of Texas of voting age were registered on November 1, 1972: if the Bureau of the Census would not count, as citizens, aliens, both legal and illegal, and if it would not count as those of voting age persons who, by the laws of the State of Texas are not eligible to vote including non-residents and persons who are mentally incompentent; (2) that more than fifty per-

cent of the persons registered to vote on November 1, 1972, did in fact vote in the presidential election of November, 1972 and that a proper interpretation of the statute calls for such a determination rather than a determination of whether more than fifty percent of citizens of voting age voted in the presidential election; (3) that the two requirements of fifty percent being registered and fifty percent voting are mutually exclusive, the one intended to cover those states where voters were registered and the other intended to cover those states where voters were not registered and that Texas, having a registration law, was only required to establish that more than fifty percent of its citizens of voting age were registered;(4) that the Attorney General could not properly certify that Texas used a "test or device" since Texas eliminated any possible effect of its use of a "test or device" (English-only elections) by earlier passing its bilingual election act; and (5) that Texas was entitled to a hearing and to an opportunity to present evidence to the Bureau of the Census before its determinations were made.

This suit was brought prior to the publication by the Attorney General of the United States or the Director of the Census of any findings made by them with reference to the applicability of the Act to the State of Texas. The action was brought seeking a declaratory judgment pursuant to Sections 2201 and 2202 of Title 28 of the United States Code (the matter in controversy exceeding the sum or value of $10,000 exclusive of interest and costs) with a prayer that the District Court restrain Census and the Attorney General from publishing any determination concerning the State of Texas in the Federal Register until the issues presented by the suit were finally resolved.

The suit was filed on September 8, 1975. On September 12, the case was before the Honorable

Gerhard Gesell, United States District Judge, for a hearing on the Plaintiffs' Motion for Temporary Restraining Order. The Court, at the conclusion of the evidence, filed its oral ruling finding that there was a genuine case or controversy over which it had jurisdiction, "both because of the nature of the Federal question and exercising the authority presented to the Court in the Declaratory Judgment statute" but denying all relief to Plaintiff-Petitioners. The Court granted Defendant's Motion for Summary Judgment, without notice of any setting or following other procedures called for by Rule 56 of the Federal Rules of Civil Procedure, and dismissed the Complaint.

Plaintiff-Petitioners appealed the Judgment to the United States Court of Appeals for the District of Columbia. That Court affirmed the Judgment on April 19, 1976, and Plaintiff-Petitioners now present their Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The determinations by the United States District Court and the United States that Texas is included within the ambit of the Voting Rights Act of 1964 (as amended in August in 1975) have already visited serious and costly consequences on the State of Texas. At least eight (8) lawsuits, attacking Texas legislative enactments, have been filed by private persons in the federal courts of Texas under the provisions of the Act (see the list of cases in Appendix "D"), and the Attorney General of the United States has objected to twenty-three (23) legislative provisions of Texas and its political subdivisions, asserting some impact upon minority voting in each (see the newspaper account attached as Appendix "E"). The threat to the sovereignty of Texas is

real, and the impact upon its governing processes is serious. This Court should accordingly grant certiorari to pass upon the decisions of the United States District Court and the Court of Appeals which have applied the Voting Rights Act to Texas. The Courts below erred for two reasons:

I. THE THRESHOLD STATUTORY PROVISIONS USED TO TRIGGER THE INCLUSION OF A STATE WITHIN THE AMBIT OF THE VOTING RIGHTS ACT WERE ERRONEOUSLY INTERPRETED BY THE COURTS BELOW.

1. Census And The Court Below Misinterpreted The Statutory Duty Of Census In Determining Coverage By The Voting Rights Act.

As prerequisite to the inclusion of a State within the provisions of the Voting Rights Act, the Bureau of the Census, acting under the authority of 4(b) of the Act, [42 U.S.C., §1973b(b)] must determine:

> "that less than 50 per centum of the persons of voting age were registered on November 1, 1972,
>
> or
>
> that less than 50 per centum of such persons voted in the presidential election of November, 1972."

As interpreted by Census and Justice (and the Courts below), only the last clause is given effect, and the first clause is disregarded since the percent of those voting could never be greater than the percent of those

registering, absent illegal voting by unregistered voters. No logical, legal reason exists for indulging in such an interpretation.

The most basic and fundamental rule of statutory construction requires an interpretation which will give meaning and effect to every word, clause and sentence of a legislative enactment. *States v. Menasche*, 348 U.S. 528 (1955); 2A Sutherland, *Statutory Construction*, §46.06 (4th Ed. 1973).

An interpretation which satisfies this elementary rule of construction would require Census to determine that less than fifty percent of the citizens of voting age were registered to vote. If there were fewer than fifty percent, the determination by Census is complete; and a state is included within the term of the Voting Rights Act if Justice makes the further required determination that the state has a "test or device" "for the purpose or with the effect of denying or abridging the right to vote . . . ." If more than fifty percent of voting age citizens are registered, then Census must make the further finding did "less than fifty percent of such persons" (i.e., those registered to vote) vote in the presidential election of November, 1972. If less than fifty percent of the registered voters actually voted, then inclusion is indicated if the further, required determination by the Attorney General is made. If more than fifty percent voted, then there can be no coverage under the Act.

In 1972, Texas had 7,514,343 citizens of voting age (a Census figure disputed by Appellants but accepted arguendo as true here) (C.A. Appendix 133, 154). 5,200,000 persons registered to vote (C.A. Appendix 153, 154), or roughly sixty-eight percent of the "citizens of voting age" registered. In the November, 1972 presidential election, 3,472,714 persons voted, roughly

sixty-seven percent of those persons registered to vote. (C.A. Appendix 133, 153).

Alternatively, the fifty percent registered or fifty percent voting clauses could have been intended by Congress to provide alternative tests where some states have voter registration laws and others do not. The first part of the clause--did fifty percent register--would serve to include or exclude states with voter registration laws from coverage. The second portion of the clause--did fifty percent vote--would be applicable only where a particular state has or had no registration law.

Either of the suggested interpretations is more logical and more in keeping with the rules of statutory interpretation than that adopted by Census and Justice, and either interpretation suggested would exempt Texas from coverage under the Voter Rights Act.

Indeed, the Court of Appeals in its opinion below initially indicated agreement with Petitioners' first-suggested interpretation (to give effect to the entire sentence setting out the duties of Census) when the Court observed at page 24 of its opinion:

> "At the outset, appellants would seem to have the better argument. It is a rule of statutory contruction that legislative enactments be so construed as to give effect to all parts."

However, the Court of Appeals then rejected this elementary cause of construction and erroneously, by and through its application of legislative history, decided that Congress had intended for only the second clause (a determination *only* of whether fifty percent of persons of voting age did vote in the applicable presidential election) to be operative and provide the standard for inclusion or exclusion. That Court pointed

to the colloquy during Congressional hearings where the Attorney General and the Director of the Census indicated that the first clause of the statute (a determination of the number of voting registrants) would be ignored. The Court then assumed that this interpretation, an interpretation of witnesses appearing before the Congress, must be correct and should be followed by the Courts. (The Court of Appeals admitted that if Petitioners' argument was accepted as correct, Texas would not be covered by the Voting Rights Act.)

However, the Congressional discussion of and the reference to the purported meaninglessness of the first clause (percentage of eligible voters registering to vote) *and* the continued inclusion of the first clause, suggest that Congress *intended that the first clause have meaning;* otherwise the clause would have been stricken from the proposed legislation. Certainly, in the context of the Congressional discussions, this interpretation (that first clause have vitality and meaning) makes more sense; and the legislative history of the Voting Rights Act supports Petitioners' position that both clauses must have meaning. This Court in *South Carolina v. Katzenbach* 383 U.S. 301 (1966), seemingly agreed with Petitioners' contention inasmuch as the Court speaks of "two findings" which Census must make. 383 U.S. at 317. (Indeed, it would be difficult, if not impossible, for Congress to adopt Petitioners' interpretation of the statute given the reasoning of the Court below. If Congress had intended that Census first determine the percentage of voters "registered", how could it have done so? No clearer language could have been used, except possibly to add, "We, the Congress, really mean for the first clause to be given force and effect; please give heed, Census and the courts.")

Moreover, there is a serious question as to whether the statutory construction tool of examining the legislative history should have been used in this case. This disputed statutory language is umambigous to the literate American, and there is no place for the use of legislative history unless there is ambiguity. *Caminetti v. United States*, 242 U.S. 476 (1970); *Barber v. Gonzales*, 347 U.S. 637 (1954). The desirability of giving effect to the words of a statute rather than to the uncertain intent of the legislative body in enacting legistation (especially true here where legislative history can be said to give support to either Petitioners' view or to the interpretation announced by the Court below) is illuminated by the preference expressed for deciding the meaning of statutory language,

> ". . . by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. *That process seems to me not interpretation of a statute but creation of a statute.*" (Emphasis added)

United States v. Public Utilities Commission of California, 345 U.S. 295, 319 (1953), Mr. Justice Jackson concurring. See also *Thermtron Products v. Hermansdorfer*, ___ U.S. ___, 96 S.Ct 584 (1976). Legislative history apparently should have validity as an interpretative tool when it supports "the plain language" of a statute (or, as indicated earlier, where the statutory language is not "plain" but is ambiguous).

Chandler v. Roudebush, ___ U.S. ___, 44 L.W. 4709, 4716 (1976).

This attempt by Census, the Attorney General and the Court below should not be permitted, and this Court should give meaning to the entire statutory injunction to Census and conclude that Texas is not within the operation of the Voting Rights Act.

2. The Attorney General And Courts Below Misinterpreted The Statutory Duty Of The Attorney General In Determining Coverage By The Voting Rights Act.

In making his required determination to trigger the coverage of Texas by the Voting Rights Act, the Attorney General merely ascertained that Texas has a "test or device", i.e., English-only elections as provided for by Section 4(b). No consideration was given to the statutory requirement that

> ". . . no State . . . shall be determined to have engaged in the use of tests or devices . . . if . . . the continuing effect of such . . . (use) has been eliminated and . . . there is no reasonable probability of their recurrence in the future. (Section 4(d) of the 1965 Act).

If the Attorney General had given effect to this provision, he *could not* have made the requisite determination that Texas used a "test or device".

Certainly with the passage of the Texas bilingual election act, the effect of English-only election has been effectively corrected and there is no probability of English-only elections in the future. (See Texas Acts 1975, 64th Leg., page 511, Ch. 213).

Moreover, Texas has not "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race and color" (Section 4(d) of the Voting Rights Act). It surely cannot be said that Texas instituted English-only elections in 1845 with the purpose of denying the right to vote since English-only elections were the *only* type of elections held in 1845 by *all* the then-existent states. Additionally, the use of English-only elections cannot be demonstrated to have had an appreciable effect on the voting of Spanish surnamed persons. For example, in the year 1974 (an off-presidential election year) seventy-five percent of eligible voters registered to vote in Texas. (C.A. Appendix 13, 14, 165-168). In those counties having over fifty percent persons of Spanish surname, seventy-two percent of eligible voters registered (C.A. Appendix 13, 14, 165-168). And there was only a .45 of one percent less voter turnout in the high Spanish surname counties. (C.A. Appendix 14). Furthermore, in the over fifty percent Spanish surname counties, there was actually a greater percentage of *registered* voters who turned out to vote, than in counties with less than five percent Spanish surname populations (C.A. Appendix 13, 14, 165-168).

Certainly, the foregoing figures rather conclusively demonstrate that there was and is no discrimination against Spanish surname persons voting.

Indeed, the representative of the Attorney General of the United States, in testifying before Congress during consideration of the Voting Rights Act of 1975, stated that evidence did not exist justifying the inclusion of Texas within the coverage of the 1975 Act (C.A. Appendix 14).

Like the Attorney General, however, the Court of Appeals concluded that Section 4(d), providing

linguistic calipers for the measuring and determination of certification by the Attorney General of the use of a "test or device", was inapplicable. The Court held that the limiting factors of Section 4(d) were intended to apply only where a state has instituted a Section 4(a) suit to terminate coverage. However, Section 4(d) applies to all of Section 4 and the Court's interpretation erroneous when the statute is read in its entirety.

Section 4(a) does provide, as the Court of Appeal noticed, for termination-of-coverage (or bailout) suits by a state. More critically, Section (a) is the general operative part of the entire Section and provides in part that:

> "no citizen shall be denied the right to vote because of his failure to comply with any test or device in any state . . ."

Section 4(b) then provides, in pertinent part, that the Attorney General shall determine whether a state has used "any test or device".

Section 4(c) defines a "test or device" as does Section 4(f)(3) which includes the English-only language election within the definition of "test or device".

Next, Section 4(d) *further defines* the term "test or device" by setting out circumstances which must be considered and decided by the Attorney General *before* he can certify that a state has engaged in the use of a "test or device". No test or device can be certified as having been used by a state if

> "(1) the incidents have been few . . . and have been corrected by State . . . action,

"(2) the continuing effect of such incidents has been eliminated, and

"(3) there is no reasonable probability of their recurrence in the future."

Notice must be taken that Section 4(d), containing the standards for determining that a "test or device" has been used, begins by stating

"For the purposes of this section" (Emphasis supplied)

This introductory phrase can *only* mean that the 4(d) qualifying factors apply to the whole section, including the 4(b) determination of "test and device" and not merely to 4(a) as held by the Court of Appeals.

It seems grammatically inescapable that the take-out modifiers of Section 4(d) *must be used* by the Attorney General in making his *determination* of coverage under Section 4(b).

As demonstrated above, then, the Attorney General in determining whether Texas used a "test or device" should have considered the following:

(1) Whether Texas, in the past, used English-only elections (the finding must, of course, have been that Texas did uniformly hold such elections);

(2) Whether incidents of discrimination have been few in number and whether the incidents have been corrected by State action (the new Texas Bilingual Election statute has accomplished the required correction);

(3) Whether the continuing effect of English-only elections has been eliminated (again, the Texas Bilingual Election statute has satisfied this requirement), and

(4) Whether there is no reasonable likelihood of recurrence of any problem presented by English-only elections in the future (and again, of course, the Bilingual Election statute insures against recurrence).

This Court can and should correct the erroneous interpretation of Section 4(d) of the Voting Rights Act, indulged in by the Attorney General and approved by the Court below, so as to require the application of 4(d) to any determination by the Attorney General in determining coverage by the Act. The Record will support a determination that the bilingual voting now existent removes Texas from the coverage of the Act. At the very least, a remand should be ordered requiring that the Attorney General properly apply and take into account the provisions of Section 4(d).

However,

Even If Petitioner's Statutory Construction Arguments Are Rejected By This Court,

II. THE VOTING RIGHTS ACT OF 1965 AS AMENDED, IS NOT APPROPRIATE LEGISLATION TO ENFORCE THE PRIVILEGES AND IMMUNITIES GUARANTEED BY THE FOURTEENTH AMENDMENT.

As earlier observed, the Voting Rights Act has constituted a serious intrusion into the state activities of Texas (as it has to other states). Justice Black in his dissent in *South Carolina v. Katzenbach*, supra, characterized that part of the Voting Rights Act which requires prior approval of a state legislation by the Attorney General as a provision which,

". . . so distorts our constitutional structure of

> government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."

However, as Justice Black stated and as held by the Court in *Katzenbach* and most recently by this Court in *Fitzpatrick v. Bitzer*, ___ U.S. ___, 44 L.W. 5120 (June 28, 1976), Congress certainly has the power to protect and "enforce" the substantive privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution *"by appropriate legislation"*.

But, as interpreted by the Court of Appeals, and as interpreted and applied by the Census and the Attorney General of the United States, the Voting Rights Act is not "appropriate legislation" and cannot be extended to Texas absent a minimum of interpretive and application safeguards.

Some balance must be achieved between Congressional protection of civil rights and the sovereignty of a state as it exists within the federal system. As this Court observed in *National League of Cities v. Usery*, ___ U.S. ___, 44 L.W. 4974, 4976 (June 24, 1976),

> "It . . . has never (been) doubted that there are limits upon the power of Congress to override state sovereignty even when exercising its otherwise plenary powers . . ."

The Court then, quoting from *Fry v. United States*, 421 U.S. 542, 547, noted,

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124

> (1941), it is not without significance. The Amendment expressly declares the constitutional policy *that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . ."* (Emphasis supplied).

Thus, while conceding that Congress has the power and the duty to protect civil rights "by appropriate legislation", such legislation cannot completely "override state sovereignty", or cause "the utter distruction of the State as a sovereign entity", or "exercise power in a fashion that impairs the State' . . . ability to function in a federal system", but any Congressional enactment must be limited by choosing a "means . . . reasonably adapted to the end permitted by the Constitution". (Quoted language is from *National League of Cities*, supra, 44 L.W. at 4976.)

The "means chosen by Congress, as applied to Texas by the executive branch of the United States (Census and the Attorney General) and by the Court below, are simply not "appropriate" "means of protecting civil rights and at the same time protecting the sovereignty of the State of Texas.

1. The Refusal Of The Director Of Census And The Attorney General To Grant Some Sort Of Hearing Or Forum To Permit Texas To Submit Evidence And Argument On The Non-Applicability Of The Voting Rights Act To Texas Was Arbitrary And Violated The Sovereignty Of Texas.

As early as July 14, 1975, Secretary of State Mark White began attempts to secure an audience before the

Director of the Census and the Attorney General in order to submit evidence and present his contentions as to the coverage or non-coverage of Texas by the Voting Rights Act of 1975 (it had become evident at that time that the Act would become effective within a short time). (C.A. Appendix 10, 16, 149). Additional, repeated requests for some sort of hearing were made by both the Secretary of State and the Governor of Texas. (C.A. Appendix 11, 17-25, 149).

On September 2, 1975, White was advised by telegram from J. Stanley Pottinger that Census would "provide . . . the opportunity . . . to provide any data and supporting documentation relevant to his (Census) determination . . . (and) your (White's) data will be received and considered fully and fairly." (C.A. Appendix 11, 149). A meeting was scheduled for September 5, 1975. (C.A. Appendix 12, 149, 150). While in preparation for the promised hearing, the Secretary of State of Texas learned that Census has already determined the issues to be discussed at the hearing. *Because*, on September 4, 1975, the Bureau of Census issued a *press release* announcing to the State of Texas and all the world that Census had determined that Texas was covered by the Voting Rights Act. (C.A. Appendix 12, 20, 150).

The scheduled, but abortive and then futile, September 5 meeting was nevertheless held, at which time White presented his views and documents. He also learned that the Director of Census in arriving at the number of "citizens of voting age" in Texas on November 1, 1972, employed the following procedures:

(a) Disenfranchised persons, such as, persons convicted of felonies and adjudicated lunatics

were included as were non-residents, military personnel and students (C.A. Appendix 12, 152, 154, 160-162);

(b) No consideration was given to the statutory language requiring the determination of whether "less than 50 per centum of the citizens of voting age were registered on November 1, 1972," (C.A. Appendix 11, 12, 151-153);

(c) No current or 1972 figures for the number of aliens in Texas as compiled by and available from the United States Bureau of Immigration and Naturalization were used to exclude such aliens from "citizens of voting age" (C.A. Appendix 12, 155-160); and

(d) A separate standard was used in the case of Texas (and in four other states) to determine "persons of Spanish heritage"so that all persons with Spanish surnames were held to be includable without regard to whether they have English language capability or even whether they can speak or read the Spanish language (C.A. Appendix 12, 24, 158, 163).

A meeting was later held before members of the United States Attorney General's staff, but White was not permitted to offer evidence, comments, criticisms or arguments as to the applicability of the Voting Rights Act to Texas (C.A. Appendix 163, 164, 177, 178). The Attorney General never offered any sort of hearing or audience to Texas before determining that it was covered by the Act. (C.A. Appendix 164).

While no *formal* hearing before either Census or Justice may be required and while the federal due process requirement may not be applicable to the

States, some opportunity to demonstrate noncoverage and some elements of fair play must be offered and accorded to a state. Anything less would raise serious constitutional problems concerning the Act, because the means chosen by Congress to protect voting rights would not satisfy the Fourteenth Amendement "appropriate legislation" requirement.

It should be recognized that this case presents a different posture than the case of *South Carolina v. Katzenbach*, supra, since Texas has consistently challenged (before publication in the Federal Register) the figures used by Census and the interpretation of the Act by both Census and the Attorney General. And, unlike the situation in *Katzenbach*, there has arisen a "plausible dispute". 383 U.S. at 333. If the determinations made by Census and the Attorney General were not the "objective statistical determinations" nor "routine analysis of state statutes" (*Katzenbach*, 383 U.S. at 333) as Petitioners have consistently urged, then some opportunity for a hearing before these agencies must be required.

Some means simply must be provided for a sovereign state to challenge the interpretations of the Act used by Census and the Attorney General before some administrative officer (not Congress) rules in such a fashion as to trigger comverage.

The need and constitutional necessity for some form of hearing is cogently illuminated by the discussions which follow:

2. The Irrationality Of The Determination Of "Citizens Of Voting Age" By Census Casts Doubt Upon The Validity Of The Voting Rights Act As Applied.

Several areas of dispute with regard to the determination made by Census have been noted above. While the inclusion of disenfranchised voters and nonresident military personnel and students in the citizenship of voting age figure may be explained by the statutory words "citizens of voting age" (all of these questionable included persons may be *citizens* for some purposes), the manner of excluding aliens and the ignoring of part of the statutory requirements for inclusion within the Act (the failure to give any effect to the statutory injunction to count the number of citizens registered) present a strong suggestion of administrative irrationality and capriciousness.

Census calculations were as follows:

Persons of Voting Age in Texas on 11/1/72 ---	7,655,000
Less Aliens of Voting Age in Texas on 11/1/72 ---	140,657
Citizens of Voting Age in Texas on 11/1/72 ---	7,514,343

(C.A. Appendix 133)

The figure for the number of aliens in Texas as of November 1972, which includes both legal and illegal aliens, is patently erroneous, and in arriving at the number Census ignored the more accurate figures compiled by the Bureau of Immigration and Naturalization, figures which show that there were 263,200 legal aliens in Texas in 1972 (not all of voting age, however) and that 209,912 illegal aliens were deported from Texas in 1972. (C.A. Appendix 155, 157; Plaintiffs' Exhibit No. 1). Plaintiffs' Exhibits 3, 4 and 5 (not admitted but a part of the Record on Appeal in the

Court below) further indicated that for every alien apprehended in Texas, at least four times that number were living in Texas and were undetected, or a figure of 1,000,000 aliens. Use of this figure would have placed Texas without the coverage of the Act (C.A. Appendix 133, 159).

This ratio of unapprehended illegal aliens to apprehended illegal aliens, four to one, is borne out by the recent study made under contract to the Bureau of Investigation and Naturalization, denominated as "Final Report - Basic Data and Guidance Required to Implement a Major Illegal Alien Study During Fiscal Year 1976."

The Report indicates that there were 2,693,600 illegal Mexican nationals who went undetected in the United States in the year of 1972. (Report, page 12). Probably one-half of the number were living in Texas, a figure of much plausibility when consideration is given to the fact that the length of the Texas Border lying adjacent to Mexico is in excess of 900 miles while the Mexican border along New Mexico, Arizona and California is only about 700 miles. Rand McNally Cosmopolitan World Atlas, 1962 Ed., pages 80, 82, 107 and 118. Moreover, the larger Mexican population centers lie below the Texas border enhancing the possibility that the major influx of illegal aliens is into Texas.

However, to use overly conservative figures, a reasonable calculation of aliens in Texas in 1972 would be:

Legal aliens: 263,000 estimated to include only 1/3 persons of voting age or	87,667
Illegal aliens apprehended: 209,912 of which it may be estimated	

that 50,000 were apprehended twice, or a figure of	159,912
Illegal aliens not apprehended: 2,693,600 for the United States of which it may be estimated that 1/4 were living in Texas, or a figure of	673,400
Total aliens in Texas by the most cautious estimates	920,979

If this more-than-reasonable figure had been used by Census, then the citizens of voting age in Texas November of 1972 would have been:

Persons of voting age (by Census figures)	7,655,000
Less aliens	920,979
Citizens of Voting Age	6,734,021

Then, even under the coverage calculations of Census and Justice (which improperly ignores the number of citizens registered to vote), there would have been over 51% of the citizens of voting age in Texas who voted in the November 1972 presidential election (3,472,714 persons voting / 6,734,021 citizens of voting age) --- and so *Texas would not have been included within the embrace of the Voting Rights Act.*

Appellants do not say the foregoing figures for number of aliens in Texas are correct (almost certainly there were more aliens than the calculated figure), but the analysis does rather conclusively demonstrate that the figure for aliens used by Census is manifestly ridiculous and constitutes an abrogation of the statutory

duty imposed by Congress to "*determine* the *citizens* of voting age" (emphasis added) as a step in the process of determining Voting Rights Act coverage.

And more importantly, the questionable nature of the figures used by Census to trigger the coverage of Texas, emphasizes the need for a hearing of some character.

3. The Decision By The Attorney General Subjecting Texas To The Voting Rights Act Was Erroneous, Irrational And Arbitrary.

Petitioners have asserted above that the Attorney General erroneously applied the triggering tests of the Voting Rights Act so as to include Texas within the coverage of the Act by failing to measure the Texas "test or device" (English-only elections) with modifying factors contained in Section 4(d), i.e., the elimination of the continuing effect of such test and the lack of any reasonable probability of recurrences in the future.

Again, with respect to the contention of Texas that such factors should have been considered before a finding that a "test or device" was used, no hearing was accorded to Texas to urge its no "test or device" theory.

The failure of the Attorney General to hold a hearing before making a determination, which has pitch-forked Texas and its political subdivisions into the morass of bureaucratic determinations, purportedly measuring the effect of its statutes and ordinances upon voting, demonstrates the "(in) appropriateness" of the Voting Rights Act, as interpreted, for the protection of civil rights.

As noticed earlier, Texas concedes the power of Congress to guarantee civil rights, including the right to vote, by enacting "appropriate legislation".

However, where the Attorney General refuses to give consideration to a position taken by a state,legislation which will permit such a happenstance, Voting-Rights-Act coverage cannot be said to be "appropriate". As noted by Mr. Justice White (in another voting rights context) in his dissent in *Georgia v. United States*, 411 U.S. 526, 543 (1973),

> "I cannot believe, however, that Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General."

And in the same case (411 U.S. at 545) Mr. Justice Powell, dissenting, said,

> "As a minimum, assuming the constitutionality of the Act, the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding rather than an ambivalent one."

Accordingly, where a Congressional enactment intrudes alarmingly and pervasively into the activities of a State, as does this Act, the unbridled authority and the serious Federal-State consequences which alarmed Mr. Justice White will become a reality, absent the imposition of proper judicial restraints. The executive officials, armed with the administration of the laws, should be acutely aware that they must perform their duties fairly and cautiously and avoid the slightest tinge of arbitrariness. Otherwise, in the federal-state, federalism context, the legislation will be deemed to be "(in) appropriate".

The determinations by Census and by the Attorney General, in triggering Voting Rights Act coverage of

Texas, ignored the law, were unreasonable and cannot form the basis for coverage. And if the law intended such precipitate actions by Census and the Attorney General; the legislation is not "appropriate" and is without the power of Congress to enact. *National League of Cities v. Usery*, supra; *Rizzo v. Goode*, ___ U.S. ___, 96 S.Ct. 598 (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

of Cities v. Usery, supra; *Rizzo v. Goode*, ___ U.S. ___, S.Ct. (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

Thus, the interpretation and application of the Voting Rights Act by Census and the Attorney General in this case must be held to be improper to save the constitutionality of the Act. Such interpretations and applications cannot have been intended by Congress.

The Voting Rights Acts, as presently *applied* to Texas, is not "appropriate legislation" to protect the voting rights of its citizens. At the very least, remand should be ordered by this Court with instructions that Census and the Attorney General performs their statutory duties in a maner consistent with "Our Federalism". *Younger v. Harris*, supra.

CONCLUSION

For the reasons stated above, Petitioners pray that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that the above and foregoing Petition for Writ of Certiorari has been served on the Defendants-Appellees by placing three copies of said Petition in the United States Mail, Air Mail, postage prepaid, on this the _____ day of July, 1976 to: Mr. Brian K. Landsberg, Attorney, Department of Justice, Washington, D.C. 20530.

LONNY F. ZWIENER
Assistant Attorney General

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1903

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., APPELLANTS

v.

EDWARD H. LEVI, UNITED STATES ATTORNEY GENERAL, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action 75-1464)

Argued December 12, 1975

Decided April 19, 1976

David M. Kendall, First Assistant Attorney General of the State of Texas, with whom *John W. Odam*, Executive Assistant Attorney General of the State of Texas, was on the brief for appellants. *Charles S. Rhyne, William S. Rhyne, Donald A. Carr* and *Richard J. Bacigalupo*, entered appearances for appellants.

Cynthia L. Attwood, Attorney, Department of Justice, with whom *Earl J. Silbert*, United States Attorney, and *Brian K. Landsberg*, Attorney, Department of Justice, were on the brief for appellees. *John A. Terry*, Assistant United States Attorney, also entered an appearance for appellees.

Before MR. JUSTICE CLARK,* *of the Supreme Court of the United States*, and ROBINSON and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: The State of Texas in this litigation contends that the Attorney General and the Director of the Census incorrectly determined that Texas became subject to the corrective provisions of the Voting Rights Act of 1965,[1] by virtue of the 1975 amendments[2] thereto, because more than five percent of the voting age citizens of Texas are members of a single (foreign) language minority and because Texas printed at least some of its election materials only in English as of November 1, 1972. The judgment of the district court agreed generally with the position of the federal government, and we affirm that decision.

The Voting Rights Act of 1965 provides, *inter alia*, that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device" with respect to which certain determinations specified in section 4(b) have been made by the Attorney General and the Director of

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* Mr. Justice Tom Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a).

[1] Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, *as amended* 42 U.S.C.A. § 1973 *et seq.* (1976 Supp.).

[2] Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

the Census.[3] In its 1975 Amendments to the Act, Congress expanded the original definition of "test or device" to include elections conducted only in English where a substantial fraction of the population of a particular jurisdiction speaks a foreign language.[4]

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[3] 42 U.S.C. § 1973b(a) (1970).

[4] In the 1965 Act, "test or device" was defined to mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b(c) (1970). The above types of tests and devices were banned nationwide (*i.e.*, not merely in areas where the trigger requirements of section 4(b) have been met but in *every* state) for five years by the 1970 Amendments to the Voting Rights Act, § 6, 84 Stat. 315, *as amended* 42 U.S.C.A. § 1973aa (1976 Supp.), and this ban was later made permanent. Act of August 6, 1975, Pub. L. No. 94-73, Title I, § 102, 89 Stat. 400. The 1975 Amendments expand the definition of "test or device" to include

> any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

42 U.S.C.A. § 1973b(f)(3) (1976 Supp.). The new category of tests and devices has not been prohibited on a nationwide basis; rather, this category is only banned in jurisdictions where the trigger requirements of section 4(b) have been met. *See* 42 U.S.C. § 1973aa(b) (1970).

The facts of this case arise under this new category of tests and devices.

The sanctions of the Act are triggered by the determinations referred to above. Specifically, after the adoption of the 1975 Amendments, section 4(b) of the amended Act requires the Director of the Census to make two determinations on or after August 6, 1975. First, he must determine whether "more than five per centum of the citizens of voting age residing in [a] State or political subdivision are members of a single language minority."[5] Second, the Director must determine with respect to each jurisdiction whether

> less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or [whether] less than 50 per centum of such persons voted in the Presidential election of November 1972.[6]

The Attorney General must then separately determine whether the particular state or political subdivision in question maintained a "test or device" on November 1, 1972.[7] In the event that both officials make affirmative determinations in the areas assigned to them by the statutory provisions mentioned above (also referred to as the "trigger" provisions), the particular state or subdivision becomes subject to corrective provisions of the amended Act[8] until such time as that jurisdiction,

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[5] 42 U.S.C.A. § 1973b(f)(3) (1976 Supp.). Strictly speaking, this determination is not a part of the Act's trigger but rather provides the basis for the Attorney General's determination that a "test or device" has been maintained in the particular jurisdiction. *See* note 4 *supra*.

"Language minority" is defined to mean persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. 42 U.S.C.A. § 1973*l*(3) (1976 Supp.).

[6] 42 U.S.C.A. § 1973b(b) (1976 Supp.).

[7] *Id.*

[8] The most relevant of these for the purposes of this case are a prohibition on conducting elections only in English, 42 U.S.C.A. §§ 1973, 1973b(f)(2) (1976 Supp.); a requirement that election and registration materials be provided in the

in a suit before a three judge court in the United States District Court for the District of Columbia, proves that it has not used a "test or device" with a discriminatory effect or purpose in ten years preceding the filing of the suit.[9]

As early as July 14, 1975 (three weeks before the effective date of the 1975 amendments), appellant White, who is Secretary of State for Texas and the state's chief election official, requested the Director of the Census and the Attorney General to grant the state a formal hearing prior to making the determinations regarding Texas required by the amended Act. It was suggested that White could present evidence which was allegedly relevant to the question of whether Texas is covered by the new law. Although the statute itself makes no provision for a hearing, the Bureau of the Census did agree to provide Texas with an opportunity to present any data and supporting documentation relevant to the census determinations, and agreed to receive and consider such data fully and fairly.[10] A meeting was scheduled for September 5, 1975.[11]

On September 4, the day before the meeting, the Bureau of the Census issued a press release[12] which

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language of the applicable language minority group, 42 U.S.C.A. § 1973b(f)(4) (1976 Supp.); a requirement that all changes in voting practices and procedures be submitted to the Attorney General or subjected to a declaratory judgment action before a three judge court in the District Court for the District of Columbia for a determination as to whether such changes have a discriminatory purpose or effect, 42 U.S.C.A. § 1973c (1976 Supp.); and the employment of federal voting examiners and observers, 42 U.S.C.A. § 1973d (1976 Supp.).

[9] 42 U.S.C.A. § 1973b(a) (1976 Supp.).

[10] Appellees' Brief at 11; App. 11.

[11] App. 149-50.

[12] Supp. App. 49-55.

stated that the Director had determined that the State of Texas met two of the "trigger" requirements: 1) that greater than five percent of the citizens of voting age were persons of Spanish heritage, and 2) that there was less than a 50 percent voter participation in Texas in the presidential election of November, 1972. The meeting was held the next day as scheduled, and although the state officials were informed that the Bureau would evaluate any evidence presented by Texas and would reconsider their determination as to the trigger requirements of the Act if that evidence showed they had erred,[13] no facts were presented which the Bureau considered required a change in this initial determination.[14]

On September 8, 1975, appellants filed suit in district court for a declaratory judgment on how and under what circumstances the determinations called for by section 4(b) of the amended Voting Rights Act should be made.[15] They also sought an injunction against the defendants

[13] App. 180-81. *See* note 34 *infra*.

[14] App. 136.

[15] App. 9. Specifically, the Texas parties asked the court to declare: 1) whether the Director of the Census, in making the determinations required by section 4(b) of the Act, may use estimates; 2) whether, in counting "citizens of voting age," the Director of the Census may include "persons convicted of felonies but not pardoned, persons in the State for temporary purposes, persons not mentally competent, and aliens, either legal or illegal. . ."; 3) whether the Director of the Census had appropriately construed the 50 percent voter participation portion of the section 4(b) trigger formula; 4) whether the section 4(b) trigger formula and the section 4(f)(3) definition of "test or device" could be applied retroactively to November 1, 1972; and 5) whether the Attorney General may determine that a jurisdiction employed a "test or device" as defined in section 4(f)(3) without determining whether the conditions stated in section 4(d) of the Act have been met. Complaint, App. 6-8.

restraining them from publishing any determination concerning the state of Texas in the Federal Register pursuant to the amended Act. On September 12, the court granted the federal parties' motion for summary judgment,[16] denied the Texas parties' motion for preliminary relief, and dismissed the case.[17] This appeal followed.[18]

I.

We first consider the jurisdiction of the district court to review the determinations of the Director of the Census, because our jurisdiction and the extent of our reviewing authority necessarily depend upon the original jurisdiction which may or may not exist in the District Court. While the decision of the trial judge on this point has not been challenged on appeal,[19] the *scope* of the

[16] This motion was originally made by the federal parties as a motion to dismiss, but was treated by the court as a motion for summary judgment without objection by either side. App. 141.

[17] Oral opinion, App. 219; Order, App. 230.

[18] On September 19, 1975, a division of this court (Leventhal and Wilkey, JJ.) denied the Texas parties' motion to enjoin publication of the section 4(b) determinations pending appeal, and ordered held in abeyance their alternative motion to enjoin the Attorney General's enforcement of section 4 of the Voting Rights Act as to Texas while its appeal was pending. Thereafter, on September 23, 1975, the Attorney General and the Director of the Census published a joint determination which stated that the state of Texas had been determined by those officials to meet the trigger requirements of section 4(b) of the amended Act. 40 FED. REG. 43746 (Sept. 23, 1975).

[19] Both sides now appear to accept the decision of the lower court on the existence and scope of its jurisdiction. *See* Brief of Appellants at 9-10; Brief for Appellees at 15-16. The only question raised is whether the district judge overstepped the jurisdictional bounds which he himself set. Brief for Appellees at 16. This argument is considered below. *See* text at 22-24 *infra*.

lower court's subject matter jurisdiction is important to a proper resolution of this case.

Section 4(b) of the Voting Rights Act of 1965 [20] provides:

> A determination or certification of the Attorney General or of the Director of the Census under this section . . . shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

That provision was held constitutional in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which stated:

> The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see *United States v. California Eastern Line*, 348 U.S. 351; *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297. In this instance, the *findings* not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4(b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

Id. at 333 (emphasis added). The Court construed this provision in a manner consistent with the interpretation given to the Act as a whole: an "inventive" solution to "nearly a century of systematic resistance to the Fifteenth Amendment" which would "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328. Thus, "the measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication." *Id.* at 327-28.

[20] Act of Aug. 6, 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 438. This provision continues to appear in the Act following the 1975 amendments. 42 U.S.C.A. § 1973b(b) (1976 Supp.).

The trial court in the instant case held that this provision did not divest it of "narrow" jurisdiction to determine whether the Director of the Census followed Congressional intent and direction.[21] The district judge stated the following standard for review:

> This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.
>
> The test that the Court feels must be applied in this circumstance under the narrow jurisdiction which I have indicated is here present is to determine whether or not the interpretation given by the Director of Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history.

(App. 222-23).

* * * *

> [A] court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained.

(App. 225).

We agree that this was the proper standard of review for the court to apply. In *Leedom v. Kyne*, 358 U.S. 184

[21] App. 221-22.

(1958), the Supreme Court ruled that a federal district court had jurisdiction to hear a challenge to a certification of a collective bargaining unit by the National Labor Relations Board despite a provision in the National Labor Relations Act which precludes direct review of such certifications.[22] In *Leedom*, the Board had, without a vote among the professional employees, included both professional and nonprofessional employees in the same bargaining unit in clear violation of section 9(b)(1) of the National Labor Relations Act, which provided that "the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."[23] The Court allowed direct review of this determination on the ground that:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

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[22] The legislative history of the Wagner Act, and of the Taft-Hartley amendments, shows a considered congressional purpose to restrict judicial review of National Labor Relations Board representation certifications to review in the Courts of Appeals in the circumstances specified in § 9(d), 29 U.S.C. § 159(d).

* * * *

Congress knew that if direct judicial review of the Board's investigation and certification of representatives was not barred, "the Government can be delayed indefinitely before it takes the first step toward industrial peace." Therefore, § 9(d) was written to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election."

358 U.S. at 191, 192 (Brennan, J., dissenting) (footnotes eliminated).

[23] 29 U.S.C. § 159(b)(1) (1958).

358 U.S. at 188. Similarly, in *International Association of Machinists and Aerospace Workers v. National Mediation Board*, 138 U.S.App.D.C. 96, 425 F.2d 527 (1970), we allowed a limited review of a decision of the National Mediation Board not to discontinue mediation and proffer arbitration under the Railway Labor Act, notwithstanding a clear legislative intent to preclude judicial review of Mediation Board actions, stating that:

> An exception to the rule of immunity has been carved out and jurisdiction of the courts established, where the papers establish on their face a plain violation by the Board of a statutory command which warrants immediate intervention by an equity court.

Id. at 105, 425 F.2d at 536. *See also Thermtron Products, Inc. v. Hermansdorfer*, 96 S.Ct. 584, 593 (1976); *Municipal Light Boards of Reading & Wakefield Massachusetts v. FPC*, 146 U.S.App.D.C. 294, 450 F.2d 1341 (1971), *cert. denied*, 405 U.S. 989 (1972).[24]

It is therefore apparent that even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority.

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[24] In the *Municipal Light Boards* case, we cited both *Leedom* and *Int'l Assn. of Machinists*, and stated:

> Our ruling is in the context of the kind of claim presented to us—that there has been an abuse of agency discretion. We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a "clear and mandatory" statutory command or reflects an error evident on the face of the papers—considerations which have been held to constitute an exception, a basis for judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction.

146 U.S.App.D.C. at 305, 450 F.2d at 1352 (footnote eliminated).

That such a limited review is permissible in this case is also evident from the opinion of the Supreme Court in *South Carolina v. Katzenbach, supra*, where the Court construed the statutory provision which is in question here to prohibit review of "*findings*"—that is, the "objective statistical determinations by the Census Bureau and . . . routine analysis of state statutes by the Justice Department." [25] The district court in the instant case was careful to note that the actual computations made by the Director of the Census were *not* within its jurisdiction to review, and that its scope of review was limited to determining whether the Director acted "consistent with the apparent meaning of the statute." [26] Narrowly defined in this manner, the jurisdiction of the trial court to consider the Director's determinations is supported by precedent, and we therefore affirm the authority of the district court to review in the present case.

II.

On this appeal appellants first contend that the Director of the Census and the Attorney General erred in failing to grant Texas "some sort of a hearing" before determining that it was covered by the Act. Although they apparently concede that they are not entitled to a *formal* hearing under the Voting Rights Act [27] and do not challenge the holding of the district court that "[t]he Administrative Procedure Act in no way affords a hearing under these circumstances," [28] they do argue that

[25] *See* text at 8 *supra*.

[26] *See* text at 9 *supra*.

[27] Appellants' Brief at 12.

[28] App. 223. Since the appellants do not contend that they were denied an opportunity to submit written comments prior to the Director's determinations, it appears that the type of "hearing" they seek is the trial-type hearing detailed by sections 7 and 8 of the APA, 5 U.S.C. §§ 556, 557 (1970),

> some opportunity to demonstrate non-coverage and some elements of fair play must be offered and accorded to a state. To require less, would raise serious constitutional problems concerning the Act—problems that must now be measured by and answered by application of the "Our Federalism" philosophy of *Younger v. Harris* [401 U.S. 37 (1971)].

(Appellants' Brief at 12). To the extent that this argument is supposed to be a constitutional challenge to the Voting Rights Act, we have no jurisdiction to consider it because appellants did not apply for a three judge court upon filing their action.[29] If, on the other hand,

which includes an opportunity to cross-examine and to know and meet the opposing evidence. A trial-type hearing before an agency is most appropriate where, as here, there are disputed issues of fact to be resolved. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01 (1958). Hearings under sections 7 and 8, however, are required *only* when either rulemaking or adjudications are required by statute to be "on the record after opportunity for an agency hearing," 5 U.S.C. §§ 553, 554 (1970). The Voting Rights Act contains no such requirement.

[29] By statute, all applications for an injunction against the execution of an Act of Congress which is alleged to be unconstitutional must be heard in the first instance by a three judge district court. 28 U.S.C. § 2282 (1970). *But cf.* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 96-98 (1974). Since there was no such application here, the issue of constitutionality cannot properly be reviewed on the merits by this court, Stratton v. St. Louis Southwestern Ry. Co., 282 U.S. 10 (1930), although had the constitutional issue been raised in the court below we would be permitted to review that court's jurisdiction to decide the matter. McLucas v. DeChamplain, 421 U.S. 21, 30 (1975). The issue of the district court's jurisdiction, however, is not raised on appeal.

Even if 28 U.S.C. § 2282 had been properly invoked below, this court would have no jurisdiction to consider the Act's constitutionality, since appeal then lies directly to the Supreme Court. 28 U.S.C. § 1253 (1970); Oldroyd v. Kugler, 461 F.2d 535 (3d Cir. 1972); Lee v. Roseberry, 200 F.2d 155 (6th Cir. 1952); Jackson v. Cravens, 238 F. 117 (5th Cir. 1916).

it is directed to our *interpretation* of that statute, it is not persuasive. In *Younger*, *supra*, the Supreme Court sustained the district court's refusal to enjoin a state criminal prosecution under California's Criminal Syndicalism Act, based in part upon

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[30]

In *Younger* the Court was dealing with a requested *judicial* action, and thus was saying that in carrying out their federal responsibilities courts should be sensitive to state interests. By contrast, the federal action involved in the instant case was *legislative*, and although the same advice might well be given to the Congress, *Younger* does not place in the hands of this court responsibility for the balancing which determines to what extent a federal statute should intrude upon state interests. That task primarily belongs to Congress, and the resolution of the matter which Congress makes should not be disturbed by a court unless it violates the Constitution.

In the case before us there is little direct evidence that Congress did consider requiring a hearing prior to the making of the required determinations[31]; but even if

[30] 401 U.S. at 44.

[31] The only reference to this issue in the legislative history appears to be in a statement by the members of the Republican minority on the House Judiciary Committee in the committee report on the Voting Rights Act:

> The "numbers game" approach, obviously designed to hit a pre-designated target, is clearly an arbitrary device unless we are to believe that, without evidence, without a judicial proceeding or *a hearing of any kind*, a contrived mathematical formula is capable of fairly delineating those States that discriminate on account of race or color and those that do not.

H.R. REP. No. 439, 89th Cong., 1st Sess., at 45 (1965) (emphasis supplied). Although this may be some evidence that the point was discussed and rejected in committee, it does not necessarily demonstrate that the idea of requiring a hearing was given reasoned consideration, nor does it give us an insight into the rationale for the possible rejection. In short, it is not at all useful.

The appellees argue that there was a proposal [Amendment No. 106 to S. 1564] made on the floor of the Senate by Senator Eastland to amend section 4 of the Voting Rights Act of 1965 to require that section 4(b) determinations be made "after notice and opportunity for hearing have been granted in accordance with the provisions of the Administrative Procedure Act," but that this amendment was "tabled and given no further consideration by the Senate." Appellees' Brief at 28. However, appellees have misread the action of the Senator and its legislative significance. The passage in the Congressional Record which appellees cite states that Amendment 106 was "submitted" by Senator Eastland and was "ordered to lie on the table and to be printed." 111 CONG. REC. 8760 (April 28, 1965). This does *not* mean that the Senator proposed a formal amendment to the bill which was then tabled by action of the Senate; rather, this procedure is one whereby an amendment which is being contemplated by a Senator may be printed, given a calendar number and called up at some future point for consideration. The object is to give the Senate some notice of an amendment that might be offered. It may *never* be called up, and indeed there is no evi-

they did not study and reject the idea, the purpose of the Act is so inconsistent with any notice-and-comment requirement as to compel the conclusion that a predetermination hearing cannot be implied from the terms of

the statute. The basic thrust of the Voting Rights Act is to avoid delay of any kind in the enforcement of voting rights[32]; the determinations under section 4(b) "consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department."[33] It would be incongruous if we were to conclude that a procedure involving a great administrative burden and delay could be implied from a statute designed to eliminate these obstructions. Nor is it logical to think that Congress would intend to impose such a procedural encumbrance upon what are essentially mechanical determinations.

This is not to say, of course, that the Attorney General and the Director of the Census could not voluntarily grant a hearing to any affected state where they felt this could be done without defeating the purpose of the statute. Indeed, a hearing was held here. It is of course unfortunate that Texas could not be given this hearing prior to publication of the Director's determinations; but we cannot second-guess his judgment that, with national elections a year away, those determinations had to be made public at the earliest possible date. We note that the Bureau indicated it would reconsider its findings if

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dence that Amendment 106 was ever offered as an amendment to the bill. Thus it appears that Amendment 106 was never actually *considered* by the Senate and no formal action (even tabling) was ever taken by the Senate upon it. Under these circumstances, such action by the Senator is no indication of Congressional intent in the legislative history of the Voting Rights Act. "An amendment submitted, ordered to lie on the table and be printed, has no parliamentary standing or status . . ." *See* Senate Procedure, S. Doc. No. 93-21, 93d Cong., 1st Sess. 72 (1974). All that really happened was that the Senator prepared a draft of a contemplated amendment, gave notice to the Senate of such draft, and then decided later not to offer the amendment to the bill.

[33] *See* South Carolina v. Katzenbach, 383 U.S. at 327-28.

[33] *Id.* at 333.

the state officials presented information demonstrating that the Bureau had erred[34]; and that at the time of the September 5 meeting, the Attorney General had not yet made his determination as to whether Texas employed a "test or device" in 1972.[35] Under these circumstances we believe that the State of Texas was afforded a participation in the decision-making process under the Voting Rights Act greater than the statute requires.

III.

Appellants raise two challenges to the determinations made by the Director of the Census.[36] First, they claim

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[34] The September 5 meeting between representatives of the Department of Justice and the Bureau of the Census, and appellant White, Secretary of State of Texas, was recorded by Mr. White. In a transcript read into the record by Mr. White in the proceedings below, the following statement is made by Meyer Zitter, Chief of the Population Division of the Bureau of the Census:

> [M]y purpose here today is to see whether there is any materials you have that would help us decide and to make a determination is, that is, basically, the population estimates and making a determination of the per cent voting should be given from what we came up with and *there is nothing that we have put out yet that precludes us from making changes.* . . .

(App. 180, emphasis added). Zitter is also quoted as later saying:

> Towards the end of the next week, even if it goes in the Register, if we find that on the basis of evidence that our arithmetic is wrong or there is a better set of data available, we are not precluded from making changes. . . .

(App. 181).

[35] The closing sentence of the press release which announced the Bureau's findings stated: "The Attorney General has not yet made a final determination under Title II." (Supp. App. 50).

[36] Two additional challenges were litigated in the district court, but not raised on appeal: 1) whether the Director of

that the Director used inaccurate data in computing the number of citizens of voting age because he failed to exclude a sufficient number of aliens from his computations. In order to make the required determination, the Bureau projected its 1970 census figures into 1972 and found a total population of voting age in Texas on November 1, 1972 of 7,655,000, less 140,657 aliens of voting age on that same date, to indicate 7,514,343 Texas citizens of voting age.[37] The appellants' contention is that the figure of 140,657 aliens is unreasonably low, and thus that the figure used by the Director for Texas citizens of voting age was too high.[38]

The main argument raised by appellants is that other statistics exist which demonstrate that the Bureau of the Census figure for aliens of voting age in Texas is patently unrealistic. To begin with, they cite Immigration and Naturalization Service [INS] figures which show that there were 263,000 *legal* aliens in Texas in 1972.[39]

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the Census erred in counting convicted felons, persons in the state for temporary purposes (such as military personnel), and persons not mentally competent as "citizens" in determining the number of citizens of voting age in the state; and 2) whether the Director erred in using a different definition of "persons of Spanish heritage" for Texas and four other states than he used for the rest of the United States. We express no opinion on these issues.

[37] App. 133.

[38] The total number of Texas citizens of voting age is specifically relevant to both aspects of the second determination required of the Director (*see* text at 4 *supra*) because it directly affects the determination as to whether 50 percent or more of the citizens of voting age were registered to vote on November 1, 1972, and whether "50 percent or more of such persons [*see* text at 24-37 *infra*] voted in the Presidential election of November 1972."

[39] DEPARTMENT OF JUSTICE, ANNUAL REPORT OF THE COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERV-

There is no indication of how many of these were of voting age. As for *illegal* aliens, numerous conflicting sources are quoted to show that a great number of them lived in Texas in 1972, far more than 140,657. INS figures are said to demonstrate that 209,912 illegal aliens were deported from Texas in 1972,[40] but that statistic is subject to at least three criticisms: again, there is no indication of how many of these were of voting age; nor is there any correction made for individuals who might have been deported two or more times; nor does this tell us how many were residing in the state on November 1, 1972. The Commissioner of the INS is quoted as saying that the number of illegal aliens in the state was four to five times the number being deported.[41] Beside the

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ICE 97 (1972) [part of this document appears in the record on appeal as Plaintiffs' Exhibit 1, but the table containing the figures which appellants cite does not]. Although appellants use figures of both 263,000 (Appellants' Brief at 13) and 263,200 (Appellants' Supp. Brief at 3), the correct figure for *permanent* residents appears to be 262,715.

[40] In his testimony during the proceedings below, appellant White attributes this figure to the Management Analyst Officer of INS. App. 158. No citation is given. In their briefs, appellants cite to the 1972 ANNUAL REPORT [Plaintiff's Exhibit 1], *supra* note 39, as a source for this statistic. Appellants' Brief at 13; Appellants' Supp. Brief at 3. But examination of that document reveals no such figure; in fact, the 1972 ANNUAL REPORT, *supra* note 39, at 76, indicates that only 16,266 aliens were deported from the *entire* United States during the year ending June 30, 1972. [Another 450,927 aliens were "required to depart" from the entire United States during the same period. *Id.*]

[41] Address by Leonard F. Chapman, Jr., Commissioner of the United States Immigration and Naturalization Service, before the Maryland Chiefs of Police Assn. and the Advertising Club of Baltimore, in Baltimore, Maryland, November 13, 1974 [Plaintiffs' Exhibit 4]. Although appellants also attribute the same statement to then-Attorney General William B. Saxbe, an examination of his speech before the Cameron

three criticisms made above which are also applicable to this statistic, its vagueness makes it unsuited for the type of numerical calculation required of the Bureau of the Census here.

Next, a recent study made under contract for the Immigration and Naturalization Service is said to indicate that 2,693,600 illegal Mexican nationals went undetected in the United States in the year 1972.[42] Again, there is no indication of how many of these were of voting age; no specification of how many resided in Texas; no means of ascertaining how many were there on November 1, 1972; and no consideration of how many *non*-Mexican aliens might have been in Texas illegally at that time. Moreover, it is to be noted that these are *estimates*,[43] whereas the census figures which they would replace are *projections* from an actual count.[44] Presumably

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County and Hidalgo County Bar Associations in Brownsville, Texas, October 30, 1974 [Plaintiffs' Exhibit 5] shows that that statistic was not mentioned.

[42] LESKO ASSOCIATES, FINAL REPORT: BASIC DATA AND GUIDANCE REQUIRED TO IMPLEMENT A MAJOR ILLEGAL ALIEN STUDY DURING FISCAL YEAR 1976 (October 15, 1975) (prepared for the Office of Planning and Evaluation, United States Immigration and Naturalization Service) [Appendix to Appellants' Supplemental Brief]. Its publication date indicates that this information was not available to the Director prior to the time he made his determinations.

[43] Obviously, *undetected* aliens cannot have been counted. *See Id.* at 12 for a description of the methodology by which the estimates were calculated.

[44] This is not to say that the Bureau of the Census has been able to count every illegal alien in Texas; many of these people would naturally be afraid to participate in the census-taking. But the figures with which the number of aliens of voting age in Texas would be used [the total population of voting age in Texas on November 1, 1972; the number of registered voters on that same date; and the number of actual voters in the national election held several days there-

the aliens who are not counted by the census would not be included in the *total* Texas population figures, either; but if statistics from two or more sources are used, aliens absent from one figure might be included in another, thus magnifying the inaccuracies.

Finally, appellants intermix "cautious estimates" from all these sources to arrive at a "more-than-reasonable" figure for the total number of aliens in Texas [with no regard, apparently, to their age].[45] The efforts by appellants to correct the source figures to meet some of the criticisms made above—*e.g.*, that certain statistics do not take into account the possibility that some aliens might have been deported more than once—only compound the uncertainties in the final figure.

What we have intended to demonstrate by this discussion is not that appellants have failed to cast some doubt upon the reliability (in an absolute sense) of the figures used by the Director of the Census; rather, our point is that however weak the census figures are thought to be, the appellants have been able to offer none better. Their figures are necessarily amalgams of estimates and hypotheses because there are no statistics available which provide what are assuredly completely accurate answers to the questions raised by section 4(b) of the Voting Rights Act. That being so, it is clearly the prerogative of Congress to specify one particular source for all the figures to be used, to insure quick availability and consistency.[46]

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after] in making the required determinations are all figures derived from actual counts. For better or worse, the Congress made a decision to use Bureau of Census figures (with all their shortcomings) exclusively, rather than to mix figures from different sources. *See* note 46 *infra*.

[45] Appellants' Supp. Brief at 4-5.

[46] The legislative history of the Voting Rights Act plainly indicates that Congress has made this choice. During the

Having determined that the Bureau of the Census properly looked only to its own statistics for the data needed by the Director to make his determinations, we can go no farther. Under the standard of review which

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debates on the 1965 Act, it was recognized that one weakness in the use of a mathematical trigger was the fact that it could be manipulated so as to include a particular area under the Act:

> [A] great deal depends upon whose source figures you consult. Under some source figures, New York County comes under the bill—under others it does not.
>
> The problem of figures is most complex. Whose figures do you use? And how correct are they? And who is to decide? We have the census figures which are supposedly correct since they are a nose count. But whose nose should you count for the purposes of this bill? The census is designed to enumerate the people—and that means all the people, including citizens, aliens, military personnel, and the dependents of the latter.

111 CONG. REC. 10859 (May 18, 1965). As is evident from the above-quoted passage, concern was expressed about the reliability of census figures in particular. *See also Hearings on Voting Rights Before the Senate Judiciary Comm.*, 89th Cong., 1st Sess., part 1, at 598 (1965) [hereinafter cited as *Senate Hearings*] (exchange between Sen. Ervin and A. Ross Eckler, Acting Director of the Census). But during the Senate hearings, the use of Civil Rights Commission figures was discussed and apparently rejected because of the limitations of those statistics. *See Senate Hearings, supra* at 596. On the other hand, supporters of the bill such as Sen. Tydings concluded that census figures, though not perfect, were the "best available":

> The population and voting statistics which the Director of the Census will determine under section 4(b) will be based on the most authoritative and reliable information available.
>
> That is the reason why we wrote the section we did in committee. That is the reason why the bill reads as it does. The pending amendment [which would have deleted language similar to that now found in 42 U.S.C. § 1973b(b) (1970) which makes the Director's determina-

we have previously approved,[47] the court has narrow jurisdiction to consider the correctness of the Director's interpretation of the statute, but not to review his computations. We find that the trial court correctly held "that there has been proper consideration given to the status of aliens in making the computations and that the Director is reasonable in relying on data derived from answers to Census questionnaires." [48] It was right for the district court to consider the sources of the Director's data to

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> tions unreviewable] woud [would] open the door for extensive litigation, questioning the Census Bureau's findings and statistics, which are the best available to us at this time in this country.

111 CONG. REC. 11470 (May 25, 1965). This view was perhaps best expressed by Sen. Mansfield, who stated:

> Inasmuch as we appropriate money every so often to the Census Bureau for the taking of the census, I believe we must have some faith in the credibility of the Census Bureau. If not, we are wasting money in maintaining that division of the Government.

111 CONG. REC. 8298 (April 22, 1965). As for the specific allegation that appellants make here—that census figures do not correctly count the number of illegal aliens in Texas—it was specifically recognized during debate on the 1975 Amendments that the Census Bureau does not count illegal aliens. 121 CONG. REC. H4889 (daily ed. June 4, 1975) (statement of Cong. Badillo).

This is not to say, of course, that the Director of the Census cannot take figures from other sources into account in making his determinations under section 4(b). *See Hearings on Voting Rights Before Subcomm. No. 5 of the House Judiciary Comm.*, 89th Cong., 1st Sess., ser. 2, at 333 (1965) [hereinafter cited as *House Hearings*]. The discretion to do so, however, lies solely with the Director and his choice of sources is not reviewable. 42 U.S.C. § 1973b(b) (1970).

[47] *See* text at 7-12 *supra*.

[48] App. 224.

the extent that this was necessary to ascertain whether he accurately interpreted his duty under the statute, but no further. Once the district court had concluded that the Director had correctly read the statute to allow him, in his discretion, to rely only on census data, it had exhausted its jurisdiction to review the Director's determinations and properly refused to consider the computations themselves. We, likewise, are without authority to consider the substance of those findings.

The second challenge made to the Director's determinations also falls within our narrow subject matter jurisdiction: appellants contend that the Director did not correctly apply that portion of section 4(b) which requires him to determine

> that less than 50 per centum of the persons of voting age were registered on November 1, 1972,
>
> or
>
> that less than 50 per centum of *such persons* voted in the presidential election of November 1972.[49]

The Director's interpretation of that passage, which was approved by the lower court, is that "such persons" means "voting age citizens." Thus, in order for the Act to apply, the Director would have to determine either that (1) less than 50 percent of the voting age citizens were registered, or (2) that less than 50 percent of the voting age citizens voted.

Appellants contend that such an interpretation would make the first clause superfluous, since the percentage of people voting could never be greater than the percentage of people registered, absent illegal voting by unregistered

[49] 42 U.S.C.A. § 1973(b) (1976 Supp.) (emphasis added). *See also* text at 4 *supra*.

voters.[50] The correct construction, they argue, is to define "such persons" as meaning "registered voters," thereby requiring the Director to find that either (1) less than 50 percent of the voting age citizens were registered, or (2) that less than 50 percent of those registered had voted, in order for the Act to apply.[51]

At the outset, appellants would seem to have the better argument. It is a rule of statutory construction that legislative enactments be so construed as to give effect to all parts.[52] However, it is also true that a construction of a statute that creates a result contrary to the

[50] Thus, it would never be necessary to determine whether less than 50 percent of the voting age citizens were registered, because (1) if less than 50 percent of the voting age citizens voted, there would be no need to determine whether less than 50 percent were registered; and (2) if greater than 50 percent of the voting age citizens voted, then of necessity greater than 50 percent of the voting age citizens must have been registered.

[51] Appellants do put forward a second construction which they argue, alternatively, should be preferred over the one adopted by the Director of the Census. Under this interpretation, that portion of the trigger clause which requires the Director to determine the percent of the voting age population which had registered to vote would apply only in states where voters are registered; the second portion of the trigger clause, requiring the Director to determine the percent of the voting age population that voted, would apply only in states that do *not* register voters. Appellants, however, do not quote a single instance of support for this construction in the debates on the Voting Rights Act, and our reading of the entire legislative history reveals none. Moreover, that same history is quite clear on the correct interpretation of this clause. *See* text at 28-36 *infra*. Thus we also reject this suggested construction.

[52] United States v. Menasche, 348 U.S. 528, 538-39 (1955); 2A C. D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973).

apparent intent of the legislature should not prevail.[53] In this regard it is noteworthy that if appellants' construction had been used when the Voting Rights Act of 1965 was first applied, many states that the Act was admittedly aimed at would not have been covered.[54] A

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[53] 2A C. D. SANDS, *supra* note 52, at § 46.07. *See also* United States v. American Trucking Assn., 310 U.S. 534, 542 (1940).

[54] The trigger provisions of the 1975 Amendments were carried over from the 1965 Act. In upholding the 1965 Act in South Carolina v. Katzenbach, the Supreme Court found:

> Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4(b) of the Act.
>
> * * * *
>
> To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination.[38] Section 4(b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.[39] All of these areas were appropriately subjected to the new remedies.

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[38] House Report 12; Senate Report 9-10.

[39] Georgia: House Hearings 160-176; Senate Hearings 1182-1184, 1237, 1253, 1300-1301, 1336-1345. North Carolina: Senate Hearings 27-28, 39, 246-248. South Carolina: House Hearings 114-116, 196-201; Senate Hearings 1353-1354.

383 U.S. 301, 329-30 (1966). It is thus clear that Congress intended Georgia, Louisiana, and South Carolina (among others) to be covered by the 1965 Act. *Yet under the appellants' construction of the trigger clause, those states would not have been covered.* In Georgia in 1964, 63.4 percent of the voting age population registered, 68.2 percent of the registered voters voted, but only 43.3 percent of the voting age population voted; in Louisiana in 1964, 63.5 percent of the voting age population registered, 74.6 percent of the registered voters voted, but only 47.3 percent of the voting age population voted; in South Carolina in 1964, 58.0 percent of the voting age population registered, 67.9 percent of the registered voters voted, but only 39.4 percent of the voting age population voted. App. 127. *Similarly, the Congress clearly contemplated that Texas would be covered by the 1975 Amendments. See* S. REP. No. 94-295; 94th Cong., 1st Sess. 24-32 (1975); H.R. REP. No. 94-196, 94th Cong., 1st Sess. 16-22 (1975). Under appellants' construction of this same trigger clause, Texas would not be covered by the 1975 Amendments. *See* Appellants' Brief at 15.

close look at the legislative history of the Voting Rights Act of 1965, from which the trigger clause was carried over without substantial change,[55] indicates that the Director's interpretation of this clause is indeed the correct one.

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[55] We sought to maintain precisely the same structure that presently exists in the act, and that is the reason that in title II the trigger mechanism that is retained is identical to the mechanism in the 1965 act. That is the principle that the jurisdictions to be covered will be those where less than 50 percent of the persons of voting age were registered to vote or actually voted.

121 CONG. REC. H4737 (daily ed. June 2, 1975) [statement of Cong. Badillo, a sponsor of the 1975 Amendments and member of the House Judiciary Committee which considered the bill, during floor debate on H.R. 6219, 94th Cong., 1st Sess. (1975), which was enacted as the 1975 Voting Rights Act Amendments, Pub. L. 94-73, 89 Stat. 400 (1975)]. In the only change of substance, the phrase "the Director of the Census determines that less than 50 per centum of the *persons* of voting age residing therein were registered" which appears in the 1965 Act was amended to substitute "citizens" for "persons." *See* 121 CONG. REC. H4884-93 (daily ed. June 4, 1975).

The Voting Rights Act of 1965 was conceived of by the Johnson Administration after other efforts to eliminate discrimination in voter registration had proved unsuccessful.[56] As introduced, the Administration's draft bill contained a trigger clause very similar to one which appears in the final 1965 Act and in the 1975 Amendments:

> SEC. 3. (a) No person shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device, in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device as a qualification for voting, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.[57]

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[56] *See Senate Hearings, supra* note 46, at 8-14 (statement of Attorney General Katzenbach).

[57] *See Senate Hearings, supra* note 46, at 1 (S. 1564); *House Hearings, supra* note 46, at 862 (H.R. 6400). Virtually the same language appears as section 4(b) of the final 1965 Act:

> (b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

79 Stat. 438 (1965). This language reoccurs with only minor changes as section 202 of the 1975 Amendments:

> SEC. 202. Section 4(b) of the Voting Rights Act of 1965 is amended by adding at the end of the first paragraph thereof the following: "On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972".

89 Stat. 401 (1975).

During the Senate hearing on this bill, Senator Edward M. Kennedy questioned Attorney General Katzenbach, representing the Administration, about the meaning of "such persons":

> Senator KENNEDY. Touching on an area where there might be some ambiguity, section 3(a)(2) states that the Director of Census is to determine "that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964." Pertaining to the last clause of that language . . . does the term "such persons," refer to people in the State who were registered to vote, or people in the State of voting age?
>
> Attorney General KATZENBACH. Persons in the State of voting age residing therein, Senator, not those registered. Presumably, normally, people have to be registered to vote. But the reference here would be simply to persons residing therein of voting age.[58]

This interpretation was confirmed several days thereafter, in a colloquy between Senator Ervin and A. Ross Eckler, Acting Director of the Census, about Eckler's interpretation of the trigger clause:

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[58] *Senate Hearings, supra* note 46, at 162.

Mr. ECKLER. Well, Senator Ervin, it would seem to us as we study this bill that although both registration and voting are mentioned, it is not necessary to assemble the registration figures since the registration figures would always be higher than the vote cast figures.

Senator ERVIN. Yes, sir. That is true.

Mr. ECKLER. Therefore, if a place, a political subdivision, or a State failed to qualify, failed to be under 50 percent on the voting criteria, it could not possibly qualify under 50 percent on the registration criteria. So it seems to us that it is not necessary for us to undertake the assembly of information on registration.

Senator ERVIN. And yet how are you going to make a certification? The bill provides that the Bureau of the Director of the Census must determine that less than 50 percent of the persons of voting age residing therein were registered on November 1, 1964. To comply with this law, you would have to do it, would you not?

Mr. ECKLER. I do not interpret, Senator Ervin, that we need to determine that they were—the wording of the legislation is that 50 percent were registered or voted. Now, if we determine, if we concentrate on the counties in which less than 50 percent voted, it seems to me impossible that we would miss any in which the percentage would be, of the registrants would be less than 50.

Senator ERVIN. Yes, sir, but that is not what the statute says the Director of the Census should do. It says the Director of the Census must determine whether less than 50 percent of the people of voting age residing therein were registered on November 1, 1964.

Mr. ECKLER. If I may comment, Senator Ervin, that is not the end of the sentence.

Senator ERVIN. No, but there is an "or" there. That is one of the things you have to certify and then you have to certify in an alternative proposition.

Mr. ECKLER. I suppose that this is something for the Attorney General to give advice on. But I certainly have worked on the assumption that we do not need to do both of these tasks, that the objective of the bill is to identify counties which meet a certain criteria.

Senator ERVIN. The Director of the Census has to determine two things. The first is that less than 50 percent of the persons of voting age residing in a particular State or political subdivision were registered on November 1, 1964. In other words, they want to catch them either way. If 100 percent were registered without discrimination, they want to catch a county or a State under the second section. If more than 50 percent, or as much as 50 percent were not registered, they want to catch them under the other section. It will catch them on either horn.

* * * *

Mr. ECKLER. [T]here could be no State which would qualify for the registration only. If it qualifies for the registration, it must, without any doubt, qualify under the voting criteria. Therefore, it seems to me that we do not need to address ourselves at all to the registration figures, that the voting figures give us completely responsive answers to our duties under this bill.

* * * *

Senator ERVIN. So under the interpretation you placed as to the primary objective of the bill, a State could register 100 percent of its adult population without any discrimination and still be brought under this bill if less than 50 percent of that 100 percent went out to vote?

Mr. ECKLER. That is my interpretation of the bill, Senator.

* * * *

Senator DIRKSEN. May I interpose?

Senator ERVIN. Yes.

Senator DIRKSEN. Mr. Eckler, of course, all that is of no concern of yours. You are not a policy-

making body. You are a statistical factfinding body and you do not have to be bothered about the two horns of this dilemma or this Texas steer. You either ascertain whether less than 50 percent registered or less than 50 percent voted. That is all you have to do. Whatever your views may be on policy would be of no concern so far as this bill is concerned, and certainly would be of no concern to the Census Bureau.

Mr. ECKLER. That is correct.

Senator ERVIN. In other words, you and the Senator from Illinois agree that the Director of the Census does not need to determine that less than 50 percent of the persons of voting age residing in an area were registered in 1964.

Mr. ECKLER. I am sorry, I did not understand the question.

Senator ERVIN. In other words, you agree with the Senator from Illinois who says that there is no need to pay attention to the provision of this bill which say the Director of the Census is to determine that less than 50 percent of the people of voting age resided in a particular State or particular subdivision registered on November 1, 1964.

Mr. ECKLER. I think my conclusion is that the phrase as a whole needs to be looked at, part 2, which has this or this, and that the criterion determined by either one is what we concern ourselves with.

Senator ERVIN. The Bureau of the Census is not prepared to make any certification at all on the first alternative, is it?

Mr. ECKLER. The first alternative, if we had to do that, we do not have the figures available. They are in some cases not available anywhere as far as I know.[59]

At this point, Senator Ervin raised the very argument upon which appellants primarily rely:

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[59] *Id.* at 599-601.

Senator ERVIN. So we might as well for all practical purposes strike that provision out of the act.

Mr. ECKLER. There may be some other provision that it serves. For the purpose of our statistics, I do not see any reason for it.

Senator ERVIN. Yes.[60]

Several minutes later, Senator Kennedy offered a rationale for including both tests:

Senator KENNEDY. I had just one very brief question, just for clarification, on this section 3(a), which charges your responsibility, Mr. Eckler.

I can see a possibility wherein that first phrase of section 2, where it says the Director of the Census determines that less than 50 percent of the people of voting age residing therein were registered on November 1, 1964, you might have 100 people or 1,000 people and you might have 75 percent of those people which would be registered as of that date. Then that would mean that the aspect of the trigger would not work, but if less than 50 percent of those people actually voted in the presidential election, then the trigger would work. In effect, then, there is an interrelationship in this. It is certainly my feeling that legislation which is directed toward the purpose in mind of registration, such a trigger certainly makes sense and is an important aspect of this legislation.

So I can understand, at least to some extent, that it is somewhat clearer as to what the responsibilities are.[61]

Although there is no indication that Sen. Kennedy's rationale was adopted by the committee, both determinations were still required by section 4(b) of the bill as

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[60] *Id.* at 601.

[61] *Id.* at 604-05.

it was reported out of committee.[62] Appendix L of the Senate Report contains tables which clearly demonstrate that the number of persons voting is to be compared to the total voting age population, and not to the number of registered voters.[63]

During the ensuing floor debate on S. 1564, the trigger clause was given the same interpretation as it had been given in committee:

> Because it seems unlikely, if not impossible, that a person could vote in the November 1964 presidential election who was not registered on November 1, 1964, for practical purposes, the criterion is that a State will have its voter qualification tests suspended if less than a fifth of the persons of the voting age were not white [*see* note 62 *supra*] and less than half of them voted in the 1964 presidential election.[64]

Although the meaning of this clause was specifically discussed at no other point during either the House or Senate debates on the 1965 Act, many senators and congressmen indicated by their references to the trigger section that they interpreted it to mean that the Director was required to determine that less than 50 percent of

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[62] *See* S. REP. No. 89-162, 89th Cong., 1st Sess. 22-23 (1965); 111 CONG. REC. 7802 (April 13, 1965) [S. 1564]. *See also* H.R. REP. No. 89-439, 89th Cong., 1st Sess. 2 (1965) [H.R. 6400]. The Senate bill at this stage contained a third trigger requirement, that the Director of the Census determine whether more than 20 percent of the persons of voting age in the particular jurisdiction were nonwhite. This requirement was eliminated in conference. *See* H.R. REP. No. 89-711, 89th Cong., 1st Sess. 12 (1965).

[63] S. REP. No. 89-162, 89th Cong., 1st Sess. 52-53 (1965). See also *Senate Hearings, supra* note 46, at 80; *House Hearings, supra* note 46, at 29.

[64] 111 CONG. REC. 11079 (May 20, 1965) (statement of Sen. Eastland).

the persons of voing age had registered *or* voted.[65] An amendment that would have eliminated that language in the clause which requires the Director to determine that 50 percent of "such persons" had voted (thereby leaving

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[65] *See, e.g.*, statement of Cong. Adams, 111 CONG. REC. 15993 (July 8, 1965); statement of Cong. Anderson, 111 CONG. REC. 15640 (July 6, 1965); statement of Cong. Ashmore, 111 CONG. REC. 15731 (July 7, 1965); statement of Cong. Buchanan, 111 CONG. REC. 16009, 16010 (July 8, 1965); statement of Cong. Callaway, 111 CONG. REC. 15722 (July 7, 1965); statement of Cong. Celler, 111 CONG. REC. 15645, 15647 (July 6, 1965); statement of Cong. Edwards, 111 CONG. REC. 16222 (July 9, 1965); statement of Cong. Farbstein, 111 CONG. REC. 15717 (July 6, 1965); statement of Cong. Lennon, 111 CONG. REC. 16234 (July 9, 1965); statement of Cong. Martin, 111 CONG. REC. 16019 (July 8, 1965); statement of Cong. McClory, 111 CONG. REC. 15662 (July 6, 1965); statement of Cong. McGregor, 111 CONG. REC. 16017 (July 8, 1965); statement of Cong. Poff, 111 CONG. REC. 16217 (July 9, 1965); statement of Cong. Rivers, 111 CONG. REC. 16025 (July 8, 1965); statement of Cong. Rodino, 111 CONG. REC. 15660 (July 6, 1965); statement of Cong. Rogers, 111 CONG. REC. 15998 (July 8, 1965); statement of Cong. Smith, 111 CONG. REC. 15639 (July 6, 1965); statement of Cong. Selden, 111 CONG. REC. 16014 (July 8, 1965); statement of Cong. Weltner, 111 CONG. REC. 16270 (July 9, 1965); statement of Cong. Widnall, 111 CONG. REC. 16223 (July 9, 1965); statement of Cong. Willis, 111 CONG. REC. 15657 (July 6, 1965); statement of Sen. Bayh, 111 CONG. REC. 8467 (April 26, 1965); statement of Sen. Eastland, 111 CONG. REC. 11079 (May 20, 1965); statement of Sen. Ellender, 111 CONG. REC. 10744 (May 17, 1965); statements of Sen. Ervin, 111 CONG. REC. 8303 (April 22, 1965), 111 CONG. REC. 9793, 9794 (May 6, 1965); statements of Sen. Hart, 111 CONG. REC. 8301 (April 22, 1965), 111 CONG. REC. 9795 (May 6, 1965); statement of Sen. Mansfield, 111 CONG. REC. 8297 (April 22, 1965); statement of Sen. Talmadge, 111 CONG. REC. 9079 (April 30, 1965); statements of Sen. Thurmond, 111 CONG. REC. 11115 (May 20, 1965), 111 CONG. REC. 11471 (May 25, 1965). *But see* statement of Sen. Ellender, 111 CONG. REC. 8297 (April 22, 1965); statement of Sen. Ervin, 111 CONG. REC. 9775, 9786 (May 6, 1965); statement of Sen. Tydings, 111 CONG. REC. 11471 (May 25, 1965).

only the determination that 50 percent of the voting age population was registered) was rejected without discussion about the construction of the entire trigger clause.[66]

Consistent with this expressed legislative intent, both the United States Commission on Civil Rights [67] and the United States Supreme Court [68] have adopted an interpretation of the trigger clause which requires the Director of the Census to determine whether registration *and* voter turnout in the 1964 Presidential election was less than 50 percent *of the voting age population.* The legislative history of the 1975 Amendments, though containing few references to the meaning of the trigger clause, also appears to support the forgoing construction.[69]

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[66] 111 CONG. REC. 11470-72 (May 25, 1965). The amendment was proposed by Sen. Ervin:

> The PRESIDING OFFICER. The clerk will state the amendment.
>
> The CHIEF CLERK. On page 6, lines 7, 8, and 9, strike out the words "or that less than 50 per centum of such persons voted in the presidential election of November 1964."
>
> Mr. ERVIN. Mr. President, the amendment would strike from the triggering process the provision which is based upon the fact that less than 50 percent of the persons of voting age in a State or county voted in the presidential election of 1964.

Id. at 11470.

[67] UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 5 (Jan. 1975).

[68] [T]he Director of the Census has determined that less than 50% of [South Carolina's] voting-age residents were registered on November 1, 1964, *or voted* in the presidential election of November 1964.

South Carolina v. Katzenbach, 383 U.S. 301, 317 (1966) (emphasis added). *See also* Gaston County v. United States, 395 U.S. 285, 286 (1969).

[69] *See, e.g.,* statements of Cong. Badillo, 121 CONG. REC. H4738 (daily ed. June 2, 1975), 121 CONG. REC. H4888 (daily ed. June 4, 1975); statement of Cong. Clay, 121 CONG. REC. H4756 (daily ed. June 2, 1975); statement of Cong. Edwards, 121 CONG. REC. H4713, H4716 (daily ed. June 2, 1975); statement of Cong. Kindness, 121 CONG. REC. H4819 (daily ed. June 3, 1975); statement of Cong. Talcott, 121 CONG. REC. H4891 (daily ed. June 4, 1975); statement of Cong. Wiggins, 121 CONG. REC. H4741 (daily ed. June 2, 1975); statement of Sen. Talmadge, 121 CONG. REC. S13357 (daily ed. July 22, 1975); statement of Sen. Thurmond, 121 CONG. REC. S13664 (daily ed. July 24, 1975). *But see* statement of Sen. Domenici, 121 CONG. REC. S13657 (daily ed. July 24, 1975); statements of Sen. Thurmond, 121 CONG. REC. S13362 (daily ed. July 22, 1975), 121 CONG. REC. S13593 (daily ed. July 24, 1975). During the debate on the 1975 Amendments, a proposal to delete the requirement that the Director of the Census determine whether less than 50 per cent of the voting age population registered to vote was defeated without discussion of the construction of the entire trigger clause. *See* 121 CONG. REC. H4797-4806 (daily ed. June 3, 1975).

It is therefore clear that the interpretation given to the trigger clause by the Director of the Census is the correct one, although it is not the one that would appear at first blush from a normal reading of the language. It is, however, the construction that is clearly required by the unquestioned interpretation given the clause during its passage through the legislative process. We thus reject the second challenge to the Director's determinations also.

IV.

Finally, appellants challenge the determination by the Attorney General under section 4(b) that Texas maintained a "test or device"—*i.e.,* English-only elections—on November 1, 1972. Their argument on this point asserts that section 4(d) of the amended Act modifies section 4(b). Section 4(d) provides:

> For the purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices *for the purpose or with the effect of denying or abridging the right to vote*

> . . . if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

42 U.S.C.A. § 1973b(d) (1976 Supp.) (emphasis added). The Texas claim that its election practices are not covered by the amended Act is based upon the fact that its state legislature enacted a bilingual election law which became effective on May 16, 1975,[70] and which has corrected the effect of English-only elections and allows a finding under section 4(d) that there is "no reasonable probability" of such English-only elections recurring in the future.

At the time of the hearing in the trial court, the Attorney General had not yet determined under section 4(b) whether Texas "maintained on November 1, 1972, any test or device," so the trial court refused to consider this issue on the ground that it was not ripe for adjudication.[71] However, the Attorney General has subsequently made that determination,[72] and to require a new lawsuit to adjudicate its validity would work a great hardship on the parties and constitute a waste of judicial energy.[73] Because we view this issue as purely one of law, we believe that it can be decided on appeal without the benefit of any further record.[74]

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[70] Tex. Acts 1975, 64th Leg., page 511, ch. 213, § 1, *codified as* 9 TEX. CIV. STAT. ANN. § 1.08a (1976 Supp.).

[71] App. 224.

[72] *See* note 18 *supra*.

[73] *See* Toilet Goods Assn. v. Gardner, 387 U.S. 158, 162 (1967).

[74] United States v. Jones, —— U.S.App.D.C. ——, ——, 527 F.2d 817, 819 (1975).

Appellants err in their contention that section 4(d) applies to the determinations made by the Attorney General under section 4(b). The plain language of section 4(d) makes it applicable to determinations as to whether a state "engaged in the use of tests or devices *for the purpose or with the effect* of denying or abridging the right to vote."[75] Section 4(d) goes on to state three tests which, if proved in a lawsuit, will support a finding that the state has not used tests or devices in the prohibited manner. The above-quoted language has reference to the wording of section 4(a), which provides that in order for a state to *terminate* its coverage under the Voting Rights Act, the state must bring an action in the United States District Court for the District of Columbia and secure a declaration by that court "that no such test or device has been used during the ten years preceding the filing of the action *for the purpose or with the effect* of denying or abridging the right to vote."[76] In the entire Voting Rights Act, as amended, *only* section 4(a) requires a determination that a state has not used tests or devices "for the purpose or with the effect" of denying or abridging the right to vote. Therefore, it is only in a *judicial* termination proceeding under that section that section 4(d) has any application or becomes relevant. *South Carolina v. Katzenbach*, 383 U.S. 301, 332 (1966). The same point is buttressed by H.R. REP. No. 89-439, 89th Cong., 1st Sess. 26 (1965), which states:

> [Subsection 4(d)] clarifies the burden of proof required of a State or political subdivision *to resume use of tests or devices in those situations where resumption would not be precluded because of subsection 4(a)*. This subsection provides that a State or political subdivision, not barred from relief under

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[75] 42 U.S.C.A. § 1973b(d) (1976 Supp.).

[76] *Id.* at § 1973b(a).

> the proviso to subsection 4(a), shall not be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if [the jurisdiction can prove that the three subparts of § 4(d) apply]. A promise not to violate the law would not meet the test of this subsection.

(Emphasis added.)

Thus, because section 4(b) only requires the Attorney General to determine whether any test or device was being *maintained* on a certain date in the past, and does not provide for him to make the further determination that the test or device was used "for the purpose or with the effect of denying or abridging the right to vote," section 4(d) is by its terms inapplicable to his action under section 4(b). The standard which section 4(d) sets out is only compatible with the action the *court* is required to take in a lawsuit under section 4(a). If Texas believes that it is entitled to be excluded from coverage under the Voting Rights Act because of compliance with section 4(d), it must bring the required action in the District Court for the District of Columbia, which has the exclusive power to determine compliance with that section's standard for termination.

We accordingly find appellants' argument on this point unpersuasive.

CONCLUSION

In summary, insofar as we have jurisdiction to consider the matter we find that the Attorney General and the Director of the Census have acted properly in carrying out their mandate under the 1975 Amendments to the Voting Rights Act, and we affirm the district court in its grant of summary judgment to the appellee-defendants.

Judgment accordingly.

APPENDIX B

PROCEEDINGS

* * * * * * * * * * * *

THE COURT: Because of the time factors involved in the case we heard this morning, Dolph Briscoe, et al., v. Edward H. Levi, et al., I have decided, as I indicated to counsel, that I should present an oral ruling. I don't intend, because I am dealing with it orally, to suggest in any way that the issues are not issues of consequence.

This case was filed in this Court House on September 8, 1975 and first came to the Court's attention on an application for a temporary restraining order, at which time, following discussion in chambers, the matter was set down for the proceedings we have had this morning.

The case has come to this Court because it is acting as the Motions Judge for the month of September and Judge Corcoran, who drew the case in the random assignment, is unavailable.

Plaintiffs, the Governor and Secretary of State of the State of Texas, brought this action because of their desire to enjoin, pending reexamination by the Court, two determinations which the parties understood were about to be announced by the Bureau of Census in accordance with the Bureau's obligations under the Voting Rights Act of 1965, as amended, particularly the rocent amendments relating to bilingual aspects of state and Federal elections.

It appeared to the Court that the first publication which was scheduled under Title III, the determination and publication scheduled for Tuesday of this week, should go forward and the motion for temporary restraining order as to that determination which concerned the number of Spanish-American individuals in certain counties of Texas should be denied.

The principal area of concern, of which that first publication was just a part, is the publication in the Federal Register, I believe scheduled for Monday of next week, which the Census Bureau contemplates making dealing, under Title II, with the State of Texas as a whole.

Injunctions, either preliminarily, temporarily or permanently against the publication of that determination next Monday, are sought by the Plaintiffs. The Government Defendants have responded by motion to dismiss; and the Court having invoked Rule 12, with consent of the parties at the outset, the Government submits, in the alternative to its motion, a prayer for summary judgment.

The issues are in one respect narrow in that this is a single-judge Court and there is no question as to the constitutionality of the statute presented or indeed attempted to be presented in these proceedings.

The first determination which the Court must make as to these new amendments, however, is a determination novel in the sense that these matters -- because of the recency of the

amendments, last August, I believe -- have not as yet come before any other Court and the matters presented are of first impression.

Initially the question is raised as to the Court's jurisdiction to hear the complaint and hear the parties. The statute, in pertinent part, as amended, here before me contains the following section:

> "A determination or certification of the Attorney General or of the Director of the Census under this Section or under Section 6 or Section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

The Government Defendants contend that that provision deprives the Court of any jurisdiction in the present controversy. The Court does not agree. We have here a pure legal question of the interpretation of certain provisions in this new amendment. A Federal question is raised involving the interpretation of the Act. The Court does not read the provision referred to as an absolute bar to examination by a Federal judge when a party properly concerned challenges the interpretation by the Executive of a congressional statute.

This issue in various forms has been presented in other litigation. I would cite United States v. California Eastern Line, in 348, U.S., and Switchmen's Union, in 320 U.S., as

examples where the courts, barring an explicit direction not to accept jurisdiction under any circumstance, have at least to a degree felt obligated as part of their duty to make such inquiry as is necessary to ascertain whether or not the Executive, in carrying out an Act of Congress, has proceeded in accordance with the congressional directive.

There is a case or controversy presented. The Secretary of State of the State of Texas and the other Plaintiff have indicated that the effect of the publication contemplated may involve expenditure of up to $10,000,000. Issues of consequence to the administration of the voting soon in prospect in Texas n connection with a constitutional referendum on November 4 certainly give the State standing and create a genuine case or controversy which the Court feels it has jurisdiction to explore, both because of the nature of the Federal question and exercising the authority presented to the Court in the declaratory judgment statute.

This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.

The test that the Court feels must be applied in this circumstance under the narrow jurisdiction which I have indicated is here present is to determine whether or not the

interpretation given by the Director of Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history.

It will not, the Court believes, serve any purpose to discuss at length a number of the questions which are presented in this regard but I do want to touch upon each of them briefly so that the Court's reasons are clear.

The first claim that is made is that the Director of Census must grant the Plaintiffs a hearing before making his determination.

There is no provision for a hearing in the statute. The possibility of requiring a hearing was considered by the Congress and declined. The Administrative Procedures Act in no way affords a hearing under these circumstances; and the Court holds that Plaintiffs are not entitled to a hearing before the Director of Census prior to his determination.

While there apparently was some failure in full communication between the parties, it should be noted that the Director of the Census has considered and been receptive to certain materials which were submitted by the Plaintiffs during the process of the determination about to be announced.

The next question presented is really a series of questions which involve interpretation of the statute. The Court is of the view that in each instance before the Court the

determination by the Director of Census is rational, consistent with the purposes and meaning of the statute and consistent with the legislative history.

The Court is of the view that there has been proper consideration given to the status of aliens in making the computations and that the Director is reasonable in relying on data derived from answers to Census questionnaires.

It seems to the Court that he has properly interpreted the phrase, "citizens of voting age," in 4(b) and has permissibly included in that figure such groups as felons, military personnel and dependents, students and mental incompetents.

The Court is of the view that the Director has properly construed the phrase, "fifty per cent of such persons," and has reasonably determined that the Voting Rights Act, as amended, is applicable, among other things, if fifty per cent of the citizens of voting age residing in the jurisdiction didn't vote in the Presidential Election of November 1972.

Those, I believe, are the principal matters.

The question of whether or not the Dirctor can rely on 1972 data seems to the Court to go to a constitutional issue ather than anything else and has not been considered.

While there has been some discussion of a determination by the Attorney General, the Court sees nothing in the record that indicates the Attorney General at this stage has made any determination.

Now the Court has reached this conclusion in part from an overview of the statute as a whole and, of course, has been substantially persuaded by the decision of the Supreme Court in North Carolina v. Katzenbach, in 383 U. S. 301, where wholly comparable if not identical matters were considered and approved by the Court.

The statutory scheme is one that is designed to avoid judicial delay at the preliminary stages of a voting problem. It is broadly designed by Congress to create a scheme that will trigger further inquiry and shift the burden from the United States to the state whose statistics have been determined to bring the Act into play.

There are protections in the Act. The Attorney General must bring enforcement proceedings where defenses are available. There is also under certain circumstances available remedies under the so-called bail-out provisions of the statute. But the first step is a step that a court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained.

Accordingly, on the merits, the Court will grant the Defendants' motion for summary judgment and the complaint is dismissed.

I think I should, however, proceed a bit further -- in the event the Court in some fashion has erred -- and deal briefly with the question of whether or not this case presents any possible basis for preliminary relief by way of temporary restraining order or preliminary injunction.

I have already indicated why I feel there is no substantial possibility of success. It is apparent that the public interest is obviously served by protection of voting rights and not by protecting against possible expenditures by the state.

The facts as before the Court do not demonstrate any determination under the statute will change as the result of these interpretative questions. As a practical matter, the arithmetic, even if the interpretations desired by the Plaintiffs were brought into play, does not appear on the face of things at least to give any promise of changing the result triggered by the publication next Monday.

It is also to be noted in that connection that the Director of the Census has reserved the right to change his determination in some particular if he reaches the conclusion he should do so. The Department of Justice, as the legislative history intimated, has indicated a willingness to discuss interim procedures to alleviate if possible the full force of the statute against the State of Texas during the interim period between this publication and the announcement and carrying out of the vote on the 4th of November.

Under all these circumstances, I see no prospect of success and no reason to feel that preliminary relief of any kind is necessary. So that as an alternative to the dismissal of the complaint, the Court is denying any temporary restraining order or preliminary injunction as sought by the Plaintiffs here.

Now, I don't know, gentlemen, whether there is any desire on the part of the Plaintiffs to have this matter reviewed this afternoon upstairs in the Court of Appeals before the Motions Panel there. I am going to be available all afternoon. That would require some brief order of some form which can be submitted to me and I will cooperate in any way that I can -- if there are any time factors in that regard -- to assist in that process.

The proceedings have been interesting and the Court appreciates the assistance of both sides.

If there is nothing further, that concludes these proceedings.

MR. ODAN: May I be heard, Your Honor?

Your Honor, in light of the statement by the Court that the publication is to be on next Monday --

THE COURT: That is what I understood. Is that the case?

MR. LANDSBERG: No, Your Honor.

THE COURT: I was told you were going to delay it a

APPENDIX C

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1903

September Term, 19 75
Civil Action 75-1464

Dolph Briscoe, Governor of the
State of Texas, et al., Appellants

v.

Edward H. Levi, United States Attorney
General, et al

Appeal from the United States District Court for the District of Columbia.

Before: Mr. Justice Clark,* of the Supreme Court of the United States,
Robinson and MacKinnon, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment----------of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher
George A. Fisher
Clerk

Date: April 19, 1976
Opinion for the Court filed by Circuit Judge MacKinnon.
*Sitting by designation pursuant to 28 U.S.C. § 294(a)

APPENDIX D

State of Texas
OFFICE OF THE SECRETARY OF STATE
Capitol Station, Austin Texas 78711

Mark White
Secretary of State

MEMORANDUM

TO: LONNY ZWIENER, ATTORNEY GENERAL'S OFFICE

FROM: KEVIN REYNOLDS, ELECTIONS DIVISION

RE: V.R.A. SUITS IN TEXAS 1975-76

DATE: JULY 13, 1976

Flowers v. Wiley (Sherman) - 575-103CA.
final order January 5, 1976. Fed. Dist. Ct. at Tyler, Judge William Wayne Justice.

Leroy, et al. v. City of Houston, et al. - 75H-1731CA.
still pending. Fed. Dist. Ct. at Houston, Judge Allen B. Hannay.

Silva v. Fitch (San Antonio) - 765A-126CA.
final order entered nunc pro tunc June 28. Fed. Dist. Ct. at San Antonio, Judge D. W. Suttle.

Rodriguez v. White (Austin) - A75-88CA.
on appeal, Judge Jack Roberts

Arlington, et al. v. Lindsay, et al. (Houston) - 75H-1722CA.
Order entered October 17, 1975, Fed. Dist. Ct at Houston, Judge Carl Bue, Jr.

Martinez v. Becker (San Antonio) - 573-315CA.
V.R.A. not plead in yet, but is anticipated - order has been entered granting a joint notion to stay the proceedings, Fed. Dist. Ct. at San Antonio, Judge D. W. Suttle.

Dorothy Lee, et al. v. Judge Billy Williamson, et al. (Tyler) - TY76-49CA. set for trial September 8, Fed. Dist. Ct. at Tyler, Judge William M. Steger.

Raza Unida v. Texas (Austin) - filing fee case, Judge Jack Roberts

APPENDIX E

Texas holds record for cases filed under Voting Rights Act

By BECKY BROWN
Capitol Staff

Texas now holds the national record for the number of objections filed in a single year by the U.S. Justice Department under the federal Voting Rights Act.

Twenty-three times since the act went into effect in September, the Justice Department has ruled that certain proposed election law changes in the state and political subdivisions would discriminate against blacks and Mexican-Americans.

The 23 objections (two were later withdrawn, leaving 21 standing) in nine months top "runner-up" Louisiana, which in 1971 drew 19 objections from the Justice Department.

But the dubious honor can be attributed to the state's size and backlog of election law changes, according to House Elections Committee staff director Brian Graham.

The number of objections is not extremely high when compared to the number of submissions from Texas, said Graham.

"It's got to be put in perspective," he said. "You can't say we're any more evil than anyone else."

Under the Voting Rights Act, which was extended to cover Texas last fall despite vehement objection from many of the state's top officials, all changes in election laws must be reviewed by the Justice Department. Objection to a change by the department is tantamount to a veto.

All changes, even in precinct lines, must be reviewed. So far, seven of the objections were to submissions from Texas cities and 10 were to submissions from school districts.

Justice Department objections to changes in state law have included a bill requiring all voters to reregister, a measure requiring a political party to receive 20 per cent of the vote in the last gubernatorial election in order to hold primary elections, and portions of the single-member legislative redistricting bill.

Graham, who is preparing a survey of the impact of VRA on Texas governmental entities, said there is speculation that Texas, before the year is out, may hold the record on the number of objections returned to any state since the passage of the original act in 1965.

"It's been generally said that (inclusion of) Texas alone doubled the Justice Department's jurisdiction," he said.

Georgia has had the most objections (37) entered against any single state between 1965 and 1975.

Graham is asking all political subdivisions in the state to respond to questions about the impact of the Voting Rights Act.

"The effect we're worried about, and I think it's a valid worry, is whether this is going to freeze everything," said Graham.

APPENDIX

VOLUME I

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,

Petitioners

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents

On Writ of Certiorari From The United States District Court For The District Of Columbia

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PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1976

CERTIORARI GRANTED DECEMBER 6, 1976

INDEX TO APPENDIX

NOTATION

The following items appear in appendices to the Petition for Certiorari at the pages noted and are not reproduced in this Appendix:

RELEVANT DOCKET ENTRIES

1975

Sept 08 COMPLAINT, appearance; Affidavit of Mark White; Exhibits A thru G.

Sept 08 SUMMONS (6) & copies (6) of complaint issued: ser:

USA & #5 ser. 9-10-75; #3 & 4 ser. 9-11-75; #1 & 2 ser. 9-10-75.

Sept 08 APPLICATION by pltfs. for Temporary Restraining Order; c/s 9-8-75.

Sept 09 MEMORANDUM Brief by pltffs. in support of application for Temporary Restraining Order.

Sept 11 MOTION by defts. to dismiss; memorandum of Federal Defts. in opposition to pltffs' motion for a preliminary injunction and in support of defts' motion to dismiss; Attachments 1, 2, 3, 4 & 5; Affidavit of Meyer Zitter w/exhibits 1 thru 6; c/m 9-11-75.

Sept 11 MOTION by Ben Reyes, Paul Moreno, Gonzalo Barrientos, George (Mickey) Leland and Paul Ragsdale to intervene as defts.; P&A; Exhibit; c/m 9-11-75. $5.00 paid and credited to the United States. Appearance of Abelardo I. Perez (1028 Conn. Ave., N.W. 20036, 659-5166).

Sept 11 APPLICATION by pltffs. for Temporary Restraining Order; Supplemental P&A; c/s 9-12-75.

Sept 12 MOTION of defts. to dismiss treated as a motion for summary judgment and application of Pltfs. for T.R.O. argued. Oral rul-

ing constituting Court's findings of fact & conclusions of law granting motion of defts. for summary judgment; dismissing the complaint & denying T.R.O. or any preliminary injunction.
(Rep. Ida Watson) Gesell, J.

Sept 15 NOTICE of Appeal by pltffs. from final judgment of 9-12-75; $5.00 paid and credited to the United States; copy sent to Cynthia Attwood.

Sept 15 APPLICATION by pltff. for stay pending appeal; c/s 9-15-75.

Sept 15 APPLICATION of Pltfs. for stay pending appeal Denied. (FIAT)
(N) Gesell, J.

Sept 16 ORDER granting summary judgment for defts. and denying pltff's application for injunctive relief and dismissing complaint.
(N) Gesell, J.

Sept 16 TRANSCRIPT of Proceedings of Sept. 12, 1975; pages 1-13; Rep. Ida Z. Watson; Pltffs copy.

Sept 16 TRANSCRIPT of Proceedings of Sept. 12, 1975; pages 1-13; Rep. Ida Z. Watson; Court copy.

Sept 16 RECORD on Appeal delivered to USCA; Receipt acknowledged. (USCA No. 75-1903)

Sept 23 TRANSCRIPT of Proceedings of Sept. 12, 1975; pages 1-83; Rep. Ida Z. Watson; Court Copy.

Sept 23 CERTIFIED copy of USCA order granting appellants' motion to dismiss application

for injunction pending appeal without prejudice.

Sept 23 SUPPLEMENTAL record on appeal delivered to USCA; receipt acknowledged.

Sept 26 STIPULATION that Pltff's Exhibits Nos. l, 2, 3, 4 & 5 be transmitted to the USCA as a supplemental record on appeal. APPROVED. (FIAT) Gesell, J.

Sept 26 EXHIBITS Nos. 1, 2, 3, 4 & 5, by pltffs.

Sept 29 NOTICE of Appeal by pltff. from judgment entered on Sept. 16, 1975; $5.00 paid and credited to the United States; copy sent to Brian K. Landsberg, Dept. of Justice. (Appearance of Lonny F. Zwiener, Asst. Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Tex. 78711).

Sept 30 CASE reassigned from Judge Corcoran to Judge Gesell on 9-26-75.

Oct 1 LEAVE to forward this notice to U.S. Court of Appeals to supplement record on appeal granted. (FIAT)Gesell, J.

Oct 1 SUPPLEMENTAL Record on Appeal delivered to USCA; Receipt acknowledged.

(HEADING OMITTED)

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COME DOLPH BRISCOE, Governor of the State of Texas, and MARK WHITE, Secretary of State of the State of Texas, complaining of EDWARD H. LEVI, United States Attorney General; J. STANLEY POTTINGER, Assistant Attorney General; VINCENT P. BARABBA, Director of the United States Census; FREDERICK B. DENT, Secretary of Commerce of the United States; and THOMAS F. MC CORMICK, Public Printer, Government Printing Office, and for cause of action would show the following:

I.

This suit is brought seeking a declaratory judgment pursuant to Sections 2201 and 2202 of Title 28 of the United States Code. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the law of the United States. Therefore, this Court has jurisdiction under Section 1331 of Title 28 of the United States Code.

II.

Plaintiff DOLPH BRISCOE is the duly elected and qualified Governor of the State of Texas charged generally with the execution of the laws of the State. Plaintiff MARK WHITE is Secretary of State of the State of Texas and is charged by statute as the Chief Election Officer of the State responsible for administration of the election laws generally throughout the State.

III.

The Voting Rights Act of 1965, (Public Law 89-110, 42 U.S.C. §1973,et seq.) was amended by the 94th Congress and those amendments were signed into law by the President of the United States in August of 1975 with the purported purpose of extending the provisions of the Act to certain State or political subdivisions of States which met various requirements or section 4(b) of the Act (28 U.S.C. §1973b). The amending language provides:

> "On or after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972."

The section further provides:

> "A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

IV.

On August 27, 1975, Defendant POTTINGER in his capacity as head of the Civil Rights Division of the Department of Justice and being the person charged by

the Attorney General with the responsibility for administering the Voting Rights Act of 1965, issued a press release in which he stated, as a fact, among other things, that the entire State of Texas is made subject to the Voting Rights Act. On August 28, 1975, and on many other occasions Plaintiff WHITE specifically requested of Defendant POTTINGER as well as of Defendant BARABBA and Defendant LEVI that the State of Texas be given a public hearing prior to official publication in the Federal Register of statistics regarding any possible inclusion of Texas under section 4 and 5 of the Voting Rights Act of 1965. While these Defendants and their subordinates have agreed to meet with Plaintiff WHITE informally, they have denied him a full and fair hearing and have refused to advise him specifically of any proper methods upon which they purport to determine that the entire State of Texas will be or should be incorporated under Sections 4 and 5 of the Voting Rights Act of 1965 pursuant to its 1975 amendments.

V.

Plaintiffs believe and hereby assert on information and belief that on November 1, 1972, more than 50 per cent of the *citizens* of the State of Texas of voting age were registered to vote and that of such persons more than 50 per cent voted in the Presidential election of November, 1972. Plaintiffs further advise and here allege that the Defendants do not have any statistics showing the number of citizens of voting age in the State of Texas on November 1, 1972, but intend to base their determinations under the Voting Rights Act of 1965 on estimates or guesses.

VI.

There is a justiciable controversy between Plaintiffs and Defendants as to whether or not the State of Texas

should be covered by the 1975 amendments to the Voting Rights Act of 1965 . Specifically the question of coverage hinges upon the following issues which have never been answered by any court construing the Voting Rights Act of 1965:

(1) In making the determination required by section 4(b) of the Act, what character of evidence and how much evidence must the Bureau of the Census have before it, or, conversely, may its determination be made on the basis of guess and estimate?

(2) May the Bureau of the Census include in the determination of the number of "citizens of voting age" persons convicted of felonies but not pardoned, persons in the state for temporary purposes, persons not mentally competent, and aliens, either legal or illegal? Plaintiffs are advised and here allege on information and belief that the Bureau of the Census, in making its determination, intends to base it on the total residents in the State without reference to citizenship or qualifications under state law.

(3) To whom does the phrase "such persons" as used in subsection 4(b)(ii) refer? It is the demonstrated position of the Bureau of the Census that it need establish only that less than 50 per cent of the citizens of voting age did vote. Such a construction of Section 4(b) renders the first required determination stated in subsection 4(b)(ii) a nullity. The required determination that less than 50 per cent of the citizens of voting age were registered on November 1, 1972 becomes surplusage under such construction. It is the contention of Plaintiffs that the second determination required by subsection 4(b)(ii) requires the Bureau to prove that less than 50 per cent of those who were registered on November 1, 1972 did vote.

(4) No test or device, as that term was defined in the Voting Rights Act of 1965 as amended in 1970, existed

in Texas on November 1, 1972. In the 1975 amendments to the Voting Rights Act, Congress enlarged the definition of the term test or device and retroactively applied it to 1972. The amending language of Section 4(f) provides:

> " (3) In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term 'test or device', as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection."

The implication of this new definition is to the effect that persons of Spanish heritage were prevented from participating in the elections process as a result of the states not making provision for assistance in the Spanish language to persons of Spanish heritage. Texas law, on every date in issue, has provided an appropriate remedy for those individuals of whatever nationality who are unable to read the English language. A directive of the Secretary of State, dated February 1, 1972 provides in part:

> "No assistance shall be given a voter in preparing his ballot except when a voter is unable to prepare the same himself because of his inability to read the English language or because of some bodily infirmity, such as

> renders him physically unable to write or to see. If the voter desires, he may select any qualified voter of the same precinct to assist him, in which event no other person, other than a watcher is allowed to be present while the ballot is being prepared.
>
> "If the voter does not make his own selection of someone to assist him, two of the election officers must be present, while one of them renders the necessary asistance. In a general election, the two officers should be of different political parties if there are such officers serving at the election. Watchers may also be present while the ballot is being prepared."

May the new definition of the term test or device be retroactively applied to November 1, 1972?

(5) May the Bureau of the Census, as it contends, make its determinations as required by Section 4(b) in a session closed to the press, without sworn evidence, or should it be required to comply with some degree of procedural due process for the benefit of the citizens of the states and political subdivisions subjected to its inquiries?

(6) May the United States Attorney General make any determination under the provisions of Section 4(b) of the Voting Rights Act of 1965, as amended, that the State of Texas has engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4 (f)(2) of the Act in view of the conditions stated in Section 4(d) under which such determination shall not be made? If Section 4(d) is to be construed in a manner in which the 1975 amendments to the Voting Rights Act of 1965 will not constitute an improper exercise of Congressional

power, the Attorney General should not make the determination provided in Section 4(b) for the reason that any incidents of the use of the newly defined voting tests or devices and failure to conform to the guarantees set forth in section 4(f)(2) have only infrequently, if at all, been for the purpose or with the effect of denying or abridging the right to vote on account of race or color. Additionally and alternatively, the use of such tests or devices, and the failure to conform to the guarantees set forth in section 4(f)(2) of the Act have been few in number.

The Voting Rights Act of 1965, if made applicable to the State of Texas, will require the State to undergo an extensive examination by the Attorney General and/or this Court of voting procedures, district line changes, etc., made or adopted since 1972. The expense to the State will be far in excess of $10,000.00 and will cause the State irreparable harm.

Plaintiffs would show that if the Court does not temporarily restrain and, upon hearing, temporarily enjoin the Defendants from publishing their so-called determination made pursuant to Section 4 (b) of the Act, Defendants will publish that determination finding the State of Texas to be covered when in fact it is not and that determination, under the terms of the Act, will not then be reviewable.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court issue its order temporarily restraining the Defendants or any of them from publishing any determination concerning the State of Texas in the Federal Register pursuant to the provisions of section 4(b) of the Voting Rights Act of 1965 as amended in 1975; that the Court set for hearing Plaintiff's motion for a temporary injunction and that at such hearing it temporarily enjoin the Defendants and any of them from publishing such determination in the Federal Register pending a final disposition of this case;

and that upon final hearing hereof the Court enter its declaratory judgment determining how and under what circumstances the determinations called for by section 4(b) of the Voting Rights Act of 1965 should be made.

(Signatures Omitted)

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

Before me, _____ a notary public in and for Travis County, Texas, on this day personally appeared Mark White, who being by me duly sworn upon oath says:

I, Mark White, Secretary of State of the State of Texas, am designated by the provisions of Article 1.03, Vernon's Texas Election Code, as the chief elections officer of the State of Texas and am charged with the responsibility to administer the state's election laws.

The 1975 amendments to the Voting Rights Act of 1965 require the United States Attorney General and the Director of the Census to make certain determinations before Sections 4 and 5 of the Act are applied to any state or political subdivision. Section 4(b) of the Act, as amended, provides, in part, as follows:

> "On or after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 percentum of the citizens of voting age were registered on November 1, 1972, or that

less than 50 percentum of such persons voted in the presidential election of November 1, 1972."

In order to carry out the duties placed upon me by state law and to protect the voting rights of every citizen of the State of Texas, I requested a hearing prior to the making of any of the determinations by either the Attorney General or the Director of the Census. The request was made in an effort to cooperate in good faith with the office of the United States Attorney General and the Bureau of the Census to bring pertinent information to their attention and also to make inquiry as to the techniques to be used.

On July 14, 1975, I wrote a letter to Dr. Vincent P. Barabba, Director of the Bureau of the Census, a copy of which is attached hereto as "Exhibit A" and incorporated herein for all pertinent purposes advising him that certain individuals are not eligible to vote in Texas and should not be included in his determinations required by Section 4(b), and, in addition, requesting that a hearing be held prior to the issuance and publication of any computations relating to voting age population and/or voter registration for the State of Texas. The request was not granted.

On July 21, 1975, I sent a communication through Western Union again requesting a hearing to determine voting age population of the state and stating that we have evidence which we believe bears directly on the issue and without which an accurate determination will not be possible. A copy of the communication is attached as "Exhibit B" and incorporated herein for all pertinent purposes. The request was not granted.

On August 7, 1975, I forwarded a communication to the Honorable Edward H. Levi, United States Attorney General, advising him that we possessed evidence which bears directly upon the question of whether the state maintained a test or device on November 1, 1972, and requesting an opportunity to be heard on the matter. A

copy is attached as "Exhibit C" and incorporated herein for all pertinent purposes. The request was not granted.

On August 27, 1975, Governor Dolph Briscoe received a communication from Vincent Barabba, a copy of which is attached as "Exhibit D" and incorporated herein for all pertinent purposes, stating that determinations had been made and "released" by the Census Bureau showing that "Texas is required to provide special assistance to minority voters in jurisdiction with responsibility under 1975 amendments, will be advertised in an early issue of the Federal Register."

On August 28, 1975, I wrote identical letter, copies of which are attached hereto as "Exhibit E" and incorporated herein for all pertinent purposes to Mr. Stanley Pottinger, Department of Justice, Honorable Edward H. Levi, United States Attorney General, and Dr. Vincent Barabba, Director, Bureau of the Census, requesting a public hearing prior to official publication in the Federal Register of statistics regarding the possible inclusion of Texas under Sections 4 and 5 of the Voting Rights Act of 1965, as amended. Further, I advised them that population figures newly compiled indicate that more than 50% of the citizens of voting age were registered in Texas on November 1, 1972 and that more than 50% of such persons voted in November, 1972. In addition, I advised that Texas wishes to inquire as to the methodology used in their determinations so that all affected parties may be assured of the accuracy of those determinations.

On September 2, 1975, a telegram was received from J. Stanley Pottinger, Department of Justice, which states that the Director of the Bureau of the Census wishes to "provide you with the opportunity you request to provide any data and supporting documentation relevant to his determination. The statute does not

provide for a formal hearing process, but your data will be received and considered fully and fairly."

Immediately, I contacted the Bureau of the Census personnel to set up such a meeting and it was scheduled for September 5, 1975. On September 4, 1975, the Bureau of the Census issued a press release stating their determinations had already been made, thereby denying the full and fair consideration of data which had been promised. The meeting scheduled for September 5, 1975, was held, at which time representatives of the Bureau of the Census reconfirmed that illegal aliens are in fact included in their determinations of citizens of voting age. In addition,they reconfirmed that other persons, although not eligible citizens for voting purposes, to-wit, convicted but unpardoned felons, were included within their computation along with lunatics, military personnel and students temporarily residing in Texas but who voted in their home states. All of these factors inaccurately reflect the citizens of voting age residing in Texas.

At the meeting on September 5, 1975, representatives of the Bureau of the Census indicated that under their interpretation of Section 4(b), that the first half of the statement under (ii), whereby the Director of the Census determines that "less than 50 per centum of the citizens of voting age were registered on November 1, 1972," is uniformly ignored, that they do not use that provision for any purpose and that it is, in fact, superfluous for any purpose. The only part of the (ii) portion of the sentence they enforce or utilize is that portion which states "or that less than 50 per centum of such persons voted in the presidential election of November, 1972." It was stated at the meeting that it is their interpretation that the words "such persons" refers to citizens of voting age rather than to those persons who are registered on November 1, 1972, and, thus, eligible to vote in Texas.

It appears that the figures upon which the Bureau of the Census bases its projections to November 1, 1972 are the 1970 Census figures which, on their face, and admittedly, include many within categories of disqualified persons, i.e., illegal aliens, convicted felons who have not been pardoned, lunatics, and non-residents temporarily residing in Texas. There are as many as 1,000 illegal aliens in Texas according to a statement by Leonard F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, on January, 21, 1975.

The Bureau of Census, upon advice from the Department of Justice, will utilize April 1, 1970 figures for purposes of determining if on November 1, 1972 more than five per cent of the citizens of voting age were members of a single language minority. A copy of a letter from J. Stanley Pottinger to Dr. Vincent Barabba of August 5, 1975, is attached hereto as "Exhibit F" and incorporated herein for all pertinent purposes.

On page 7 of the letter, paragraph (iii)(f), is stated:

> "Although the Act gives no specific date as of which the five percent determinations are to be made, it is our understanding that the Bureau will have to make these determinations as of April 1, 1970, because of the limitations of the data available."

On the other hand, on page 4, paragraph (iii)(g), Mr. Pottinger states:

> "Although the Act requires the five percent determinations to be made as of November 1, 1972, it is our understanding that Census will have to make these determinations as of April 1, 1970, because of the limitations of the data available."

The decision to rely upon 1970 census figures in one instance and 1972 figures in another is arbitrary in every sense except that such reliance tends to dictate results under which Sections 4 and 5 of the Act would apply to Texas and other states. Consequently, it appears that the Justice Department and Bureau of the Census are deliberately and arbitrarily selecting figures contrary to law. The State of Texas was promised that a full and fair hearing would be conducted; but the conduct of the Civil Rights Division of the Department of Justice and Bureau of Census conclusively demonstrate an intent to do otherwise.

The terms of the 1975 amendments render it impermissible for the Attorney General to make the determination triggering coverage of the State of Texas by Sections 4 and 5 of the Act. Section 4(d) of the Act states:

> "For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."

Incidents of the use of any voting test or device, if any, on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) of the Act have been few in number. As chief election officer, no such use has ever been brought to my attention and I know of

no such use. Elections which have been held in Texas wherein all election materials were printed in the English language have not been used by the State of Texas with the purpose or effect of denying or abridging the right to vote on account of race or color. The evidence is overwhelming that no such purpose or effect has resulted from any action of Texas. By virtue of a Directive of the Secretary of State in February of 1972, any person who is unable to read the ballot may seek and obtain instructions and assistance in preparing the ballot, either from an elections official or from some volunteer the voter brings into the polling place for that purpose. In sharp contrast to the story told by the statistics relating to the states originally covered by the Voting Rights Act of 1965 (at which time there was no evidence to cover Texas), the relevant statistics based on 1970 census figures, show that persons of Spanish origin or descent register and vote in numbers roughly corresponding to their portion of the total population in the various areas of the state. In those counties containing over 50 per cent persons of Spanish surname, 72 per cent were registered for the 1974 general election. In those counties containing under 5 per cent persons of Spanish surname, 79 per cent were registered for the 1974 general election. The statewide average was 75 per cent. In those counties containing over 50 per cent persons of Spanish surname, 22.73 per cent voted in the 1974 general election. In those counties containing under 5 per cent persons of Spanish surname, 23,18 per cent voted in the 1974 general election. The difference in voter turn-out in high Spanish surname vs. low Spanish surname counties, therefore, was .45 of one per cent. By the logic under which the 1965 Act was originally applied to states of the Old South, a low voter turn-out was presumed to be the result of an almost total lack of participation by the particular minority population. That presumption is refuted in the Texas case and Section 4(d) of the Act

states that the determination of coverage should not be made in Texas' case because it is demonstrable that the supposed "test or device" was not used with the evil purpose or effect with respect to persons of the particular language minority.

The Department of Justice has, this year, in testimony by J. Stanley Pottinger, before Congress stated that evidence does not exist to justify inclusion of Texas within the coverage of the Act. J. Stanley Pottinger, on April 29, 1975, in a statement before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee could not have stated it with more clarity:

> "in light of the other remedies available and in light of the stringent nature of the special provisions, the Department of Justice has concluded that the evidence does not require expansion based on the record currently before us."

The Department of Justice, in September of 1975, should not be able to contend that a voting "test or device" has frequently been used in Texas for the purpose of denying or abridging the right to vote on account of race or color. Section 4(d) of the Act states that the Attorney General shall not make such a determination in light of the facts admitted by Mr. Pottinger.

To the extent that a test or device has been utilized, its use had been so infrequent that such use had not been brought to the attention of my office. To the extent that there has been some proscribed use of a test or device under the new definition, it has surely been properly and effectively corrected by the passage and immediate implementation of Senate Bill 165, 64th Legislature, 1975, a copy of which is attached as "Exhibit G", and

incorporated herein for all pertinent purposes. S.B. 165, requires the use of Spanish language elections materials and ballot translations in every polling place where there is 5 per cent or more population of Spanish origin or descent. S.B. 165 was passed and was in effect before the passage of the 1975 amendments to the Voting Rights Act of 1965 and the origins of the bill can be traced to a time before the idea was generally circulated that an English only election in Texas could possibly constitute a "voting test or device" within the meaning of the Voting Rights Act of 1965. Certainly there is no reasonable probability of the recurrence of English only elections in Texas in any area wherein there resides more than 5 per cent persons of Spanish origin or descent. Texas law prohibits it.

STATE OF TEXAS)
) By S/S
) Mark White,
COUNTY OF TRAVIS) Secretary of State

I,_____, a Notary Public, do hereby certify that on this____day of_____, 19__, personally appeared before me Mark White being duly sworn, declared that he is the Secretary of State, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

By S/S
_____
Notary Public in and for
_____, County, _____
My commission expires:___

July 14, 1975

Dr. Vincent P. Barrabba
Director
Bureau of Census
Washington, D.C. 20501

Dear Director:

I have been advised this date by members of the staff of the Bureau of Census that you are in the process of creating the numbers that would pertain to Texas and other political subdivisions affected by the 1975 amendments to the Voting Rights Act. The enclosed Constitutional and statutory provisions concerning those individuals who are not eligible to vote in Texas are germane to the decision you may be called upon to make concerning the voting age population of our State. Persons of unsound mind, convicted felons and all aliens are not permitted to vote in Texas, and therefore, I feel should not be included in computing the voting age population for Texas. I will be most happy to procure statistical support for the actual numbers of individuals affected by these prohibitions.

Also, let me assure you of the continuing assistance of our office in developing any voter registration figures which you may desire. The Office of Secretary of State has not compiled a voter registration total for the date, November 1, 1972, and therefore, some time would be required by our office to bring accurate information to you for inclusion in your computations.

Also, let this letter serve as our official request to appear and be heard prior to the issuance and publication in the Federal Register of any computations relating to voting age population and/or voter registration, as those figures might pertain to Texas.

I trust that the Bureau of Census shares my concern that whatever figures are in fact created, that they be accurate in every respect. I shall happily assist you and your office in every manner possible to achieve a high degree of accuracy in your computations.

Please advise me of whatever procedures need be followed in order to bring these most important matters before you in the most efficient manner.

Sincerely yours,

Mark White
Secretary of State

MW:m
Enclosure

(Exhibit A)

Western Union Telefax

Call Letters FFH Charge To SECRETARY OF STATE

Mr. Vincent P. Barabba
Director of the Census
Bureau of the Census
Department of Commerce
Washington, D.C. 20236

[Personal Del. Report]
[Delivery Report]

The State of Texas requests a hearing to determine voting age population of the state pursuant to 42 U.S.C. 1973b. We have evidence available which we believe bears directly on the issue and without which an accurate determination will not be possible. Please advise at your earliest convenience of the setting of a hearing and the proper procedures for submission of evidence.

Mark White
Secretary of State,
State of Texas

Western Union Telefax

08018 Collect Washington DC 07-21 1128 EDT
PMS Mark White, Secretary of State, State of Texas

ASKG RD Y2 1-0312231202 1657 01104 07-21 250P
CDT AUSTIN TX

Your Telegram To Vincent P. Baraba Bur. of Census Dept of Commerce, Wash DC was delivered 1125P EDT Jul 21 Via Tlx Western Union.

(Exhibit B)

August 7, 1975

The Honorable Edward H. Levi
United States Attorney General
Department of Justice
Constitution Avenue & 10th St., N.W.
Washington, D. C. 20530

Dear General Levi:

As you are aware, Section 4(b) of the Voting Rights Act of 1965, as amended in 1975, provides that the application of the Act shall be extended to any state or political subdivision for which the Director of the Census determines that less than 50% of the citizens of voting age were registered on November 1, 1972 or that less than 50% of such persons voted in November of 1972, and which the Attorney General determines maintained a test or device on November 1, 1972.

The State of Texas possesses evidence which bears directly upon the question of whether the state maintained a test or device on November 1, 1972. In order that you may have benefit of this evidence prior to making the determination required by the Act; the State of Texas respectfully requests the opportunity to appear and be heard on this matter.

Please advise me of the procedures that need to be followed in order that the State of Texas may be granted a hearing prior to your determination.

Sincerely yours,

BY S/S
Mark White
Secretary of State

MW:lkc

(Exhibit C)

Western Union Mailgram

MGMSNTT HSA
1-028921C239 08/27/75
1-028921C239 08/27/75
TLX CENSUS BUR WSH
008 WASHINGTON D C AUGUST 27
ZIP 78711

Governor Dolph Briscoe
State Capitol
Austin, Texas 78711

Statistical Determinations made under the 1975 Amendments to the Voting Rights Act (Public Law 94-73) and released today by Census Bureau show that Texas is required to provide special assistant to minority voters in 1975 fall elections. Additional details and a list of jurisdictions with responsibility under 1975 amendments will be advertised in an early issue of the Federal Register, for interim information call member of my staff at 301-763-5072.
Vincent Barabba
Director
Bureau of the Census

15:17 EST

MGMSNTT HSA

(Exhibit D)

STATE OF TEXAS
OFFICE OF THE SECRETARY OF STATE
AUSTIN, TEXAS 78711
August 28, 1975

Mark White
Secretary of State

Bruce Hughes
Asst. Secretary of State

Mr. Stanley Pottinger
Department of Justice
Constitution Avenue & 10th St., N.W.
Washington, D. C. 20530

Dear Mr. Pottinger:

The State of Texas requests a public hearing prior to official publication in the Federal Register of statistics regarding the possible inclusion of Texas under Sections 4 and 5 of the Voting Rights Act of 1965, as amended.

Population figures newly compiled indicate that more than 50% of the citizens of voting age were registered in Texas on November 1, 1972 and that more than 50% of such persons voted in November, 1972. In addition, Texas wishes to inquire as to the methodology used in your determinations so that all affected parties may be assured of the accuracy of those determinations.

Please notify me of the setting of a public hearing to present this evidence for your consideration.

Sincerely yours,

BY S/S
Mark White
Secretary of State of Texas

(Exhibit E)

STATE OF TEXAS
OFFICE OF THE SECRETARY OF STATE
AUSTIN, TEXAS 78711
August 28, 1975

Mark White
Secretary of State

Bruce Hughes
Asst. Secretary of State

The Honorable Edward H. Levi
United States Attorney General
Department of Justice
Constitution Avenue & 10th St., N.W.
Washington, D. C. 20530

Dear General Levi:

The State of Texas requests a public hearing prior to official publication in the Federal Register of statistics regarding the possible inclusion of Texas under Sections 4 and 5 of the Voting Rights Act of 1965, as amended.

Population figures newly compiled indicate that more than 50% of the citizens of voting age were registered in Texas on November 1, 1972 and that more than 50% of such persons voted in November, 1972. In addition, Texas wishes to inquire as to the methodology used in your determinations so that all affected parties may be assured of the accuracy of those determinations.

Please notify me of the setting of a public hearing to present this evidence for your consideration.

Sincerely yours,

BY S/S
Mark White
Secretary of State of Texas

(Exhibit E)

STATE OF TEXAS
OFFICE OF THE SECRETARY OF STATE
AUSTIN, TEXAS 78711
August 28, 1975

Mark White
Secretary of State

Bruce Hughes
Asst. Secretary of State

Dr. Vincent P. Barabba
Director
Bureau of Census
Washington, D. C. 20501

Dear Dr. Barabba:

The State of Texas requests a public hearing prior to official publication in the Federal Register of statistics regarding the possible inclusion of Texas under Sections 4 and 5 of the Voting Rights Act of 1965, as amended.

Population figures newly compiled indicate that more than 50% of the citizens of voting age were registered in Texas on November 1, 1972 and that more than 50% of such persons voted in November, 1972. In addition, Texas wishes to inquire as to the methodology used in your determinations so that all affected parties may be assured of the accuracy of those determinations.

Please notify me of the setting of a public hearing to present this evidence for your consideration.

Sincerely yours,

BY S/S
Mark White
Secretary of State of Texas

(Exhibit E)

Department of Justice
Washington, D.C. 20530

Aug 5 1975

Mr. Vincent P. Barabba
Director, Bureau of the Census
Washington, D.C.

Dear Mr. Barabba:

At my meeting with Meyer Zitter, Chief of your Population Division, on July 28, 1975, we agreed that the Department of Justice would provide the Bureau of the Census with certain information and direction regarding the determinations to be made by the Bureau pursuant to the Voting Rights Act Amendments of 1975. This letter is intended to provide that information and to amplify, and in some instances correct, the information contained in our memorandum of July 28, 1975:

A. Title II requires the Census to determine those states and political subdivisions in which: i) on November 1, 1972, more than five percent of the citizens of voting age were members of a single language minority (Sec. 202, 203); [1] and ii) on November 1, 1972, less than 50 percent of the citizens of voting age were registered, or less than 50 percent of such persons voted in the Presidential election of November, 1972 (Sec. 202).Title II also requires the Attorney General to determine which jurisdictions with more than five percent citizens of voting age who are members of a language minority maintained English-only elections, as defined by Section 203, on November 1, 1972.

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[1]Defined as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage. (Sec. 207)

(Exhibit F)

i) As we agreed at our meeting on July 28, the most appropriate chronology of events would be for the Attorney General to make his determinations after the Director of the Census makes his.

ii) In order to make the required determinations the Bureau needs a description of what constitutes a "political subdivision" within the meaning of the Act in every state. A list by state is attached to this letter.

iii) There are several ambiguities in the Bureau's requirement to determine which jurisdictions had more than five percent citizens of voting age who were members of a single language minority. These ambiguities have been resolved by us in ways which we believe are consistent with the letter and intent of the Act, which do not infringe upon the right to vote, and which at the same time promote administrative convenience.

(a) The act does not define the term "Asian American." The legislative history indicates that the Bureau is to count only persons who are identified as Korean, Chinese, Japanese, and Phillipino as "Asian American." Rep. Don Edwards, Cong. Rec. H. 4716, June 2, 1975. In addition, it is our understanding that for purposes of the November 1972 determination statistical information is readily available to the Bureau regarding these four Asian subgroups, but is not available regarding other Asian subgroups, such as Vietnamese, or Burmese. Therefore, for purposes of the Title II determinations, the Bureau should only count Koreans, Chinese, Japanese, and Phillipinos.

(b) The Act does not indicate what subgroups constitute the category "Alaskan Natives." The legislative history indicates that three groups of native Alaskans, Aleuts, Eskimos, and American Indians residing in Alaska should be counted as "Native Alaskans." Rep. Don Edwards, Cong. Rec. H. 4716, June 2, 1975. For purposes of the Title II determinations, the

Bureau should count persons in these three subgroups as "Alaskan Natives."

(c) The Act does not define the term "American Indian." The legislative history indicates that persons who either identified themeselves in the Census as American Indian, or who indicated membership in an American Indian tribe, are to be counted as "American Indian." Rep Don Edwards, Cong. Rec. H. 4716, June 2, 1975.

(d) The Act does not define the term "persons of Spanish heritage." The legislative history indicates that the Director of the Census is to identify such persons as: "persons of Spanish language" in 42 states and the District of Columbia; "persons of Spanish language," as well as " persons of Spanish surname" in Arizona, California, Colorado, New Mexico, and Texas; and persons of Puerto Rican birth or parentage" in New Jersey, New York, and Pennsylvania. Rep. Don Edwards, Cong. Rec. H. 4716, June 2, 1975.

(e) The Act does not indicate whether the Director of the Census is to aggregate subgroups within the Asian American, American Indian, and Native Alaskan categories in order to determine whether five percent of the population in a jurisdiction belong to one of the "single language minority" groups. The language of the Act itself, read in light of the overall purpose of the Act, leads to the conclusion that if there is any ambiguity on this point, it ought to be resolved in the following manner: i) In order to determine whether a jurisdiction has greater than five percent Asian American citizens of voting age, the Director of the Census should *not* aggregate the four Asian American subgroups (see (a) above). This means that if a jurisdiction is to meet the five percent requirement, because of its Asian

American population, it must have greater than five percent of at least one of the Asian subgroups. ii) However, in determining whether a jurisdiction meets the five percent requirement because of its Alaskan Native or American Indian population, the Director of the Census should aggregate all persons who fall within any of the identifiable subgroups. In other words, in counting Alaskan Natives, the Director should add Aleuts, Eskimos and American Indians residing in Alaska; and in counting American Indians, the Director should add all persons who indicate they are American Indian or who report affiliation with an American Indian tribe regardless of tribe.

(f) The Act provides that the Director of the Census is not to aggregate members of the four distinct language minority groups in making his determinations under Title II. Thus, if a jurisdiction contains 3 percent voting age citizen Asian Americans and 3 percent voting age citizen persons of Spanish heritage it would not meet the five percent requirement of Title II.

(g) Although the Act requires the five percent determinations to be made as of November 1, 1972, it is our understanding that Census will have to make these determinations as of April 1, 1970, because of the limitations of the data available.

B. Title III requires the Director of the Census to determine those states and political subdivisions in which: i) more than five percent of the citizens of voting age are members of a single language minority (defined as in Title II); where ii) the illiteracy rate of such persons as a group is higher than the nationwide illiteracy rate (Sec. 301). Political subdivisions within any state triggered by this formula, but in which the language minority group which triggered statewide coverage

represents less than five percent of the voting age citizen population of the political subdivision, are not triggered by Title III (Sec. 301). "Illiteracy" is defined as failure to complete the fifth primary grade. (Sec. 301).

i) The Attorney General does not make any determinations under Title III, so that jurisdictions are covered by the Title upon the Director's publication of his determinations in the Federal Register.

ii) "Political subdivision" is defined under Title III the same as under Title II (see attached list by state).

iii) Ambiguities in Title III have been resolved (consistent with the letter and intent of the Act) as follows:

(a) "American Indian," "Alaskan Native," and "persons of Spanish heritage" shall be defined as they are for purposes of Title II (see A(iii)(b)-(d) above).

(b) "Asian American" shall be defined as it is for purposes of Title II (see A(iii)(a)), for purposes of the initial determination of coverage under Title III. If, at a future time, the Bureau has readily available statistics on any other Asian subgroup, such as Vietnamese, or Burmese, the Director should then request of the Attorney General which of these subgroups are to be included within the definition of "Asian American" for purposes of future determinations under Title III.[2]

(c) In determining whether a jurisdiction meets the five percent requirement of Title III, the Bureau should apply the same instructions as in Title II regarding aggregation or nonaggregation of subgroups of language minority groups (see A(iii)(e) above).

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[2] The Bureau of the Census will be required to make new determinations of coverage under Title III when statistics on the 1980 census are available.

(d) As with Title II, the Bureau should not aggregate members of the four distinct language minority groups in making the five percent determination (see A(iii)(f) above).

(e) The language of the Act itself, read in light of the overall purpose of the Act leads to the conclusion that the illiteracy requirement of the trigger of Title III should be determined as follows: i) The plain meaning of Title III indicates that hte Director of the Census should compute the nationwide illiteracy rate based upon voting age citizens (see Senate Report on S. 1279, p.39). ii) The illiteracy rate which the Bureau is to compute to compare with the nationwide illiteracy rate should be the illiteracy rate for voting age citizens of the group or groups which meet the five percent requirement only. Thus, if a jurisdiction has over five percent Chinese, one percent Japanese, and over five percent persons of Spanish heritage, the Director should compute iliteracy rates only for Chinese and persons of Spanish heritage. If the illieracy rate for Chinese or persons of Spanish heritage in the jurisdiction is greater than the nationwide illiterac;y rate, the jurisdiction would then be subject to the requirements of the Title as to that group. (Of course, the jurisdiction might be covered as to both groups if their illiteracy rates are both above the nationwide figure). However, the jurisdiction would not under this hypothetical be subject to any requirements as to the Japanese population, as there are less than five percent Japanese citizens of voting age (see A(iii)(e)). The following list will clarify any confusion on this point:

If there are more than five percent citizens of voting age who are

Alaskan Natives	*The Bureau should determine the illiteracy rate in that jurisdiction of*	Alaskan Natives
American Indians		American Indians
Chinese		Chinese
Japanese		Japanese
Korean		Korean
Phillipino		Phillipino
Persons of Spanish Heritage		Persons of Spanish Heritage

(f) Although the Act gives no specific date as of which the five percent determinations are to be made, it is our understanding that the Bureau will have to make these determinations as of April 1, 1970, because of the limitations of the data available.

C. Attached is a list of states in which elections are scheduled this fall. The first priority of the Bureau of the Census should be to make Title II and III determination for those states which have elections coming up. Thereafter, determinations as to all other states should be made as quickly as possible.

D. It is our understanding that the Bureau of the Census will develop a method of resolving statistically marginal determinations. It would, of course, be appropriate to delay any determinations which are statistically questionable in order to make a special canvas in those areas which are marginal.

I hope that this letter addresses those issues which have been outstanding regarding the responsibilities of the Bureau of the Census under Titles II and III. We will be happy to deal with any additional questions that arise. So that we may carry out our responsibilities under the Act, please provide us with your estimate of the length of time which will be required by the Bureau to complete its determinations under Titles II and III. Thank you for the Bureau's cooperation and assistance.

Sincerely,

BY S/S
J. Stanley Pottinger
Assistant Attorney General
Civil Rig.. s Division

(Exhibit F)

S.B. No. 165

AN ACT

requiring use of bilingual election materials and voter registration material in English and Spanish in certain areas and permitting use of the bilingual materials in other areas; amending the Texas Election Code by adding Sections 8a and 45c; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. The Texas Election Code is amended by adding Section 8a to read as follows:

"8a. Bilingual election materials in English and Spanish.

"Subdivision 1. Elections and areas in which bilingual materials are required. (a) In every general, special, or primary election, by whatever authority held, which is held within a county in which five percent or more of the inhabitants are persons of Spanish origin or descent, according to the federal census specified in Paragraph (b) of this subdivision, the election materials enumerated in Subdivision 3 of this section shall be printed in both English and Spanish for use at the polling place in each election precinct that is not exempt from this requirement under Subdivision 2. In the elections of a political subdivision that includes territory in more than one county, the bilingual materials must be used in each precinct that includes territory lying within a county to which this subdivision applies unless the precinct is exempt under Subdivision 2.

"(b) The census used for determining the percentage of persons of Spanish origin or descent is the last

preceding federal decennial census for which the enumeration date was more than two years before January 1 of the calendar year in which the election is held.

"Subdivision 2. Election precincts exempt from requirement. (a) An election precinct situated in a county to which Subdivision 1 applies is exempt from the requirement for bilingual election materials if official census information or other information shows that persons of Spanish origin or descent comprise less than five percent of the inhabitants of the precinct. The authority holding the election has the burden of establishing entitlement to the exemption. Unless otherwise ordered by a court of competent jurisdiction, the officer or body responsible for obtaining the supplies for the election is relieved of the duty to furnish bilingual materials for those precincts for which there has been filed with the clerk or secretary of the political subdivision responsible for the expenses of the election, at least 30 days before the date of the election, a certificate executed by the presiding officer of the governing body of the political subdivision and approved by the governing body, identifying the precinct or precincts for which the exemption is claimed, together with an abstract of the official census information or other information relied on to support the exemption and a map or maps showing the precinct boundaries and the boundaries of the census enumeration areas referred to in the abstract. An authenticated copy of the resolution or other document evidencing the governing body's approval must be filed with the certificate.

"(b) A new certificate and new supporting information must be filed following each decennial census. The supporting information must be revised following a change in election precinct boundaries, and

a revised certificate must be filed if the certificate on file no longer correctly reflects the exempt precincts.

"(c) In the case of a primary election held by a political party, the exempt precincts are those reflected in a certificate executed by the county judge or the secretary of state and filed in the office of the county clerk. The secretary of state is authorized to file a certificate for a county whenever the county judge has not filed a certificate by the 60th day before the date of the primary or whenever the certificate on file does not correctly reflect the exempt precincts.

"Subdivision 3. Enumeration of required bilingual materials; preparation of the materials. (a) At each polling place where election materials in English and Spanish are required, the following materials shall be provided in bilingual form:

"(1) Instruction cards for the information of voters shall be printed in both English and Spanish, either on separate cards to be posted side by side or on the same card with the Spanish text alongside the English text.

"(2) Where voting machines or voting devices are used, a Spanish translation of the instructions for operating the machines or devices shall be posted in the compartment or booth that the voter occupies.

"(3) All ballots and ballot labels may be printed with all ballot instructions, office titles, and propositions appearing in both Spanish and English. If the bilingual listing on the face of the ballot is not utilized, then a Spanish translation of the ballot shall be posted in each compartment or booth, and a statement shall be placed on the face of the ballot in Spanish to inform the voter that the Spanish translation is posted in the compartment or booth; and where paper ballots are used and booths are not provided for all voters, copies of

the Spanish translation shall also be made available at the table where the voter selects his ballot, and a sign printed in Spanish shall be displayed at the table, informing the voter that he may take a copy of the Spanish translation for his use in preparing his ballot.

"(4) All affidavit forms or other forms that voters are required to sign may have a Spanish translation printed beneath the English text or on the reverse side of the printed matter appearing on the form. If this translation is not utilized, then a Spanish translation of the affidavit shall be made available, and a statement shall be placed on the affidavit in Spanish that a Spanish translation is available upon request.

"(b) The secretary of state shall prepare the Spanish translation for all bilingual materials required by Subdivisions 3 and 4 of this section, except ballot forms for local elections. The secretary of state shall prepare the Spanish translation of the ballot propositions for proposed constitutional amendments and other measures submitted by the legislature if the legislature fails to provide a Spanish text. The officer having the duty to make up the ballot for a local election shall prepare the Spanish translation of ballot material if the governing body of the political subdivision fails to provide a Spanish text.

"Subdivision 4. Bilingual materials for absentee voting. In any countywide election, or in any election held in a political subdivision other than a county, in which bilingual election materials are required at any polling place in the county or other political subdivision, the absentee voting materials shall be printed in both English and Spanish. The forms for applying for an absentee ballot, the ballot envelopes and carrier envelopes, and any other instructions or forms furnished to the voters shall be printed in English with a Spanish translation on the face of the instrument or furnished

separately along with the instrument. All ballots and ballot labels used for absentee voting shall be printed in the manner described in Subdivision 3; and whenever the Spanish translation of ballot propositions is printed separately from the ballot, a copy of the translation shall be furnished to each voter who votes by mail. In the conduct of absentee voting by personal appearance, any other materials enumerated in Subdivision 3 which are used in the voting shall be in bilingual form.

"Subdivision 5. Optional use of bilingual materials. In any election held in a county to which Subdivision 1 of this section does not apply, or at any polling place where bilingual materials are not made mandatory under Subdivision 1, the governing body of the political subdivision responsible for the costs of the election may require the use of bilingual ballots and such other items of election materials enumerated in Subdivisions 3 and 4 as the governing body specifies, for any or all of the polling places as specified by the governing body; and the election officers of the political subdivision shall furnish bilingual materials in accordance with the resolution, ordinance, or other document by which their use is required. The governing body may provide for use of the bilingual materials on a continuing basis or on an election-by-election basis, as it sees fit."

Sec. 2. The Texas Election Code is amended by adding Section 45c to read as follows:

"45c. Voter registration application forms in Spanish.

"The secretary of state shall prescribe a voter registration application form that is printed in Spanish. In each county in which five percent or more of the inhabitants are persons of Spanish origin or descent, according to the last preceding federal decennial census, the registrar shall keep a supply of these, and

shall keep a notice in Spanish posted at the place in his office where voter registration is conducted, stating that application forms in Spanish are available. Registrars in other counties may also use this form if they wish to do so. Every registrar in the stae is required to accept and process applications that are tendered to him on the bilingual form, in the same manner as other applications."

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create and emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

(Exhibit G)

(SUMMONS OMITTED)

(HEADING OMITTED)

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, Dolph Briscoe, Governor of the State of Texas, and Mark White, the Secretary of State of the State of Texas, move the Court for a Temporary Restraining Order enjoining Defendants from publishing any determination concerning the State of Texas in the Federal Register pursuant to the provisions of Section 4 of the Voting Rights Act of 1965, 42 U.S.C.§1973 *et seq.* as amended by Pub. L. No. 94-73 (Act), on the grounds that:

1. The Act provides that Defendants Barabba and Levi make the following determinations:

a. Section 4(b) provides in part that:

"(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines

maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were "registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On or after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the presidential election of November 1972."

b. Section 4(f)(3) provides that:

"(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census detemines that more than 5 per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined

in this subsection, shall be employed only in making the determinations under the third sentence of that section."

c. Section 4(d) provides that:

"(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or device for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."

d. Section 203(b) provides that:

"(b) Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) "that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: Provided, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the

statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court."

2. Plaintiffs have proferred to Defendants evidence that, under the sections of the Act under which Defendants are required to determine whether, *inter alia*, the State of Texas is covered by the Act, Defendants cannot, as a matter of fact and of law, determine the State of Texas to be so covered.

3. Defendants have rejected each and every proffer of evidence showing that the State of Texas is not covered by the Act, rejecting one such proffer as late as September 4, 1975. (See Affidavit of Plaintiff Mark White at page 3).

4. Defendants have advised Plaintiffs that, without receiving Plaintiffs proffered evidence of non-coverage under the Act, Defendants will publish determinations required by the Act as set forth above, concerning the State of Texas, beginning September 9, 1975 in the *Federal Register*.

5. Plaintiffs have no remedy at law in that Section of the Act provides:

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

6. Plaintiffs will be irreparably harmed unless immediate injunctive relief is granted in that an unreviewable determination of coverage under the Act

will make impractical the preparations undertaken in administration of an election on a proposed Contitution to be held in the State of Texas on November 4, 1975.

7. Plaintiffs show a strong likelihood of success on the merits as set forth in the accompanying Memorandum of Points and Authorities in support of this Application.

WHEREFORE, Plaintiffs pray that the Court enjoin and restrain Defendants, and each of them individually and in his official capacity, his agents and others acting in concert with him, *pendent lite*, from taking any action to publish in the *Federal Register* or otherwise, any of the determinations required by the Act and set forth above.

(Signatures Omitted)

(CERTIFICATE OF SERVICE OMITTED)

* * * * * **(MEMORANDUM BRIEF OMITTED)**

* * * * * **(SUPPLEMENTAL MEMORANDUM) OF AUTHORITIES OMITTED)**

(HEADING OMITTED)

MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, defendants Edward H. Levi, *et al.*, move for dismissal of this action because the Court lacks jurisdiction over the subject matter of this action and because the complaint fails to state a claim upon which relief can be granted.

Defendants' memorandum is attached setting out the reasons and authorities supporting this motion.

Respectfully submitted,

BY S/S

EARL SILBERT
United States Attorney

BRIAN K. LANDSBERG
CYNTHIA L. ATTWOOD
JAMES KIECKHEFER
Attorneys,
Department of Justice,
Washington, D.C. 20530
739-2195

(HEADING OMITTED)

ORDER

This cause came on to be heard on Motion of Plaintiff for a Preliminary Injunction, and on motion of Defendants to dismiss.

Upon consideration of evidence and issues presented in legal memoranda and affidavits, and at hearing before this Court on September 12, 1975, this Court concludes that Plaintiffs' motion for preliminary injunction should be denied and that Defendants' motion to dismiss should be granted.

IT IS THEREFORE ORDERED by the Court that Plaintiffs' motion for preliminary injunction be denied.

IT IS FURTHER ORDERED that Defendants' motion to dismiss be granted, and the action is hereby dismissed with prejudice.

DATED:_____, 1975.

_____
UNITED STATES
DISTRICT JUDGE

* * *

MEMORANDUM OF FEDERAL DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS. (NOT REPRODUCED IN ITS ENTIRETY)

AN EXHIBIT ATTACHED TO THE MEMORANDUM

DEPARTMENT OF COMMERCE

Bureau of the Census

VOTING RIGHTS ACT AMENDMENT OF 1975

Determinations Under Title III

In accordance with the requirements of Section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973, et seq., as amended by the Voting Rights Act Amendment of 1975, Public Law 94-73) the Bureau of the Census has determined that the political subdivisions in the following table have more than five percent of their citizen population of a specified language minority group and meet the requirement for coverage under Title III of the Act Amendment for that minority. Determinations for additional subdivisions in these and other States will appear in later issues of the FEDERAL REGISTER.

Dated: September 3, 1975

VINCENT P. BARABBA
Director,
Bureau of the Census.

States or Political Subdivisions Covered Under Title III, of the Voting Rights Act Amendment of 1975

State or Political Subdivision	*Specified language minority*[1]
* * *	
Texas(statewide)	
Andrews County	Spani
Aransas County	Do.
Atacosa County	Do.
Bailey County	Do.
Bastrop County	Spanish
Bee County	Do.
Bell County	Do.
Bexar County	Do.
Blanco County	Do.
Borden County	Do.
Brazoria County	Do.
Brazos County	Do.
Briscoe County	Do.
Brooks County	Do.
Burleson County	Do.
Caldwell County	Do.
Calhoun County	Do.
Cameron County	Do.
Castro County	Do.
Cochran County	Do.
Coke County	Do.
Colorado County	Do.
Comal County	Do.
Concho County	Do.
Cottle County	Do
Crockett County	Do.
Crosby County	Do.
Culberson County	Do.
Dallam County	Do.
Dawson County	Do.
Deaf Smith County	Do.
DeWitt County	Do.

* * *

State or Political Subdivision	*Specified language minority*[1]
Dimmit County	Do.
Duval County	Do.
Ector County	Do.
Edwards County	Do.
Ellis County	Do.
El Paso County	Do.
Falls County	Do.
Fisher County	Do.
Floyd County	Do.
Foard County	Do.
Fort Bend County	Do.
Frio County	Do.
Gaines County	Do.
Galveston County	Do.
Garza County	Do.
Glasscock County	Do.
Goliad County	Do.
Gonzales County	Do.
Grimes County	Do.
Guadalupe County	Do.
Hale County	Do.
Hansford County	Do.
Harris County	Do.
Haskell County	Do.
Hays County	Do.
Hidalgo County	Do.
Hockley County	Do.
Howard County	Do.
Hudspeth County	Do.
Jackson County	Do.
Jeff Davis County	Do.

State or Political Subdivision	*Specified language minority*[1]
Jim Hogg County	Do.
Jim Wells County	Do.
Jones County	Do.
Karnes County	Do.
Kendall County	Do.
Kenedy County	Do.
Kerr County	Do.
Kimble County	Do.
Kinney County	Do.
Kleberg County	Do.
Lamb County	Do.
Lampasas County	Do.
La Salle County	Do.
Live Oak County	Do.
Lubbock County	Do.
Lynn County	Do.
McCulloch County	Do.
McMullen County	Do.
Martin County	Do.
Mason County	Do.
Matagorda County	Do.
Maverick County	Do.
Medina County	Do.
Menard County	Do.
Midland County	Do.
Milam County	Spanish
Mitchell County	Do.
Nolan County	Do.
Nueces County	Do.
Parmer County	Do.
Pecos County	Do.
Presidio County	Do.
Real County	Do.
Reeves County	Do.
Refugio County	Do.
Robertson County	Do.

* * *

State or Political Subdivision	*Specified language minority*[1]
Runnels County	Do.
San Patricio County	Do.
San Saba County	Do.
Schleicher County	Do.
Scurry County	Do.
Sherman County	Do.
Starr County	Do.
Sterling County	Do.
Sutton County	Do.
Swisher County	Do.
Taylor County	Do.
Terrell County	Do.
Terry County	Do.
Tom Green County	Do.
Travis County	Do.
Upton County	Do.
Uvalde County	Do.
Val Verde County	Do.
Victoria County	Do.
Ward County	Do.
Webb County	Do.
Wharton County	Do.
Willacy County	Do.
Williamson County	Do.
Wilson County	Do.
Winkler County	Do.
Yoakum County	Do.
Zapata County	Do.
Zavala County	Do.

[1]Generally jurisdictions in which more than 5 percent of the citizen population are members of a language minority and the illiteracy rate is greater than the national rate.

(FR Doc.75-23861 Filed 9-8-75; 8:45 a.m.)

* * *

AN EXHIBIT ATTACHED TO THE MEMORANDUM OF FEDERAL DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS. (MEMORANDUM IS NOT REPRODUCED IN ITS ENTIRETY)

DEPARTMENT OF JUSTICE

Washington, D.C. 20530

Honorable Dolph Briscoe
Governor
State Capitol
Austin, Texas 78711

Dear Governor Briscoe:

On August 6, 1975, the Voting Rights Act Amendments of 1975, Public Law 94-73, were signed by the President. This law places new and important responsibilities upon States and their political subdivisions, and upon the U.S. Attorney General. As part of our responsibilities for the implementation and enforcement of the Voting Rights Act of 1965, as now amended, we have sent copies of the attached material to the chief executive and the legal and election officials in political subdivisions of your State which are listed in the attachment.

If you have any questions regarding the 1975 Amendments, and their effect upon political subdivisions within your State, please contact me. Mr. Barry Weinberg, Deputy Chief, Voting Section of the

Civil Rights Division (202-739-3168) will be happy to answer any inquiries which your staff may have.

Sincerely,

By S/S

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

cc: State Attorney General
Secretary of State

TEXAS

The attached letter was sent to the following counties in reference to their Spanish Heritage language minority.

Anderson	Freestone	Madison
Angelina	Gray	Marion
Archer	Grayson	Martin
Armstrong	Gregg	Mason
Austin	Hamilton	Matagorda
Baylor	Hardeman	Maverick
Bosque	Hardin	Medina
Bowie	Harrison	Mills
Brown	Hartley	Montague
Callahan	Henderson	Montgomery
Camp	Hill	Morris
Carson	Hood	Nacogdoches
Cass	Hopkins	Navarro
Chambers	Houston	Newton
Cherokee	Hunt	Ochiltree
Childress	Hutchinson	Oldham
Clay	Jack	Orange
Coleman	Jasper	Palo Pinto
Collin	Jefferson	Panola
Collingsworth	Johnson	Parker
Comanche	Kaufman	Polk
Cooke	King	Rains
Cottle	Lamar	Randall
Dallam	Lavaca	Red River
Delta	Lee	Roberts
Denton	Leon	Rockwall
Donley	Liberty	Rusk
Eastland	Limestone	Sabine
Erath	Lipscomb	San Augustine
Fannin	Llano	Shackelford
Fayette	McLennan	Shelby
Franklin	McMullen	Smith

Somervell	Tyler	Wheeler
Stephens	Upshur	Wichita
Stonewall	Van Zandt	Wilbarger
Tarrant	Walker	Wise
Titus	Waller	Wood
Trinity	Washington	Young

DEPARTMENT OF JUSTICE

Washington, D.C. 20530

On August 6, 1975, the Voting Rights Act Amendments of 1975, Public Law 94-73, were signed by the President. Because our preliminary analysis indicates that your jurisdiction will be affected by this legislation, I wish to direct your attention to the major provisions of the new law, which we recognize are complex, and request that you provide us with the information necessary for the Attorney General to make certain determinations required by law. A copy of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1970 and 1975, is included.

The 1975 Amendments extend for seven years the coverage of the certain jurisdictions under the so-called "special" provisions[1] of the Voting Rights Act of 1965, and make permanent the nationwide ban on the use of literacy and similar tests. In addition, *Section 4* of the Act as now amended expands the coverage formula for the "special" provisions of the Act to states and political

[1]The special provisions of the Act consist of (1) Attorney General power to dispatch examiners to register voters; (2) same with regard to observers to watch election day activities; and (3) the requirement that all covered states and counties submit new election laws to the Attorney General or the federal district court in D.C. for approval.

subdivisions in which: (1) more than 5% of the citizens of voting age were members of a "language minority" [2] on November 1, 1972; (2) election and registration materials were offered only in English; and (3) less than 50% of the voting age citizens were registered to vote or voted in November, 1972. Determinations as to coverage under this formula are to be made by the Director of the Census and the Attorney General; are effective upon publication in the Federal Register; and are not reviewable in any court.

Jurisdictions covered by operation of Section 4 are now required to provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the language of the applicable language minority in addition to English. (Section 4 (f) (4)) [3]In Addition, jurisdictions covered by Section 4 are subject to the "special" preclearance and federal examiner and observer provisions of the Act (Sections 5-9, 13, 14. See footnote 1 above.). Such jurisdictions may seek to terminate Section 4 coverage by bringing an appropriate action for declaratory judgment before the United States District Court for the District of Columbia (Section 4a).[4]

[2]Defined by the Amendments as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."

[3]If the language minority's language is unwritten, the covered jurisdiction is required to provide oral assistance.

[4]In a similar but distinct requirement, the Act as now amended in *Section 203* bans for ten years English-only elections in states and political subdivisions where over 5% of the voting age citizens are members of any single "language minority" which has an illiteracy rate greater than the nationwide illiteracy rate. A jurisdiction which is designated by this Section 203 formula is required to provide the same bilingual registration and election assistance as required by Section 4.

Although the Director of the Bureau of the Census has not yet published his determinations under the Amendments, preliminary data indicate that your jurisdiction falls within the Section 4 coverage formula of the Amendments with regard to the language minority group(s) referenced at the beginning of this letter.[5]

In order that we may determine, as required by Section 4 of the Amendments, whether your jurisdiction provided election and registration materials in only the English language in 1972, I am requesting that you inform me in writing within ten days of receipt of this letter whether your jurisdiction provided election and registration materials bilingually in November, 1972. If your jurisdiction provided such materials bilingually, please include supporting evidence to that effect.

If your jurisdiction is determined finally to be covered by Section 4, the requirements for provisions of bilingual election and registration materials become effective immediately upon our publishing in the Federal Register the list indicating that your jurisdiction is covered. We are presently drafting interim guidelines, which will also be published in the Federal Register shortly, outlining the Department's interpretation of the bilingual election requirements of the Amendments. The interim guidelines are intended for use by covered jurisdictions in complying with the requirements of the two Amendments until permanent guidelines are published. Permanent guidelines may modify the interim guidelines, and comments on your experience with the interim guidelines are therefore solicited. As soon as the interim guidelines are prepared for publication, a copy will be sent to you. We will also

[5]See my attached letter to Vincent Barabba, Director, Bureau of the Census, outlining in detail the procedures to be used in making these determinations.

send you a copy of the determinations of the Director of the Census and the Attorney General which, as I have indicated, will be published in the Federal Register. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, a copy of which is enclosed, are already published in Title 28 Code of Federal Regulations, Part 51.[6]

If you have any questions regarding the 1975 Amendments, and their effect upon your jurisdiction, please contact Mr. Barry Weinberg, Deputy Chief, Voting Section of the Civil Rights Division (202--739-3168). In addition, we would appreciate your informing us of any upcoming elections in your jurisdiction which could be affected by the new amendments.

Sincerely,

By S/S

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

[6]These procedures will require some technical amendments to conform to the 1975 Amendments. Their substance, however, will remain the same.

TEXAS

The attached letter has been sent to the following counties in your state in reference to their Spanish Heritage language minority.

Andrews
Aransas
Atascosa
Bailey
Bandera
Bastrop
Bee
Bell
Bexar
Blanco
Borden
Brazoria
Brazos
Brewster
Briscoe
Brooks
Burleson
Burnet
Caldwell
Calhoun
Cameron
Castro
Cochran
Coke
Colorado
Comal
Concho
Coryell
Crane
Crockett
Crosby
Culberson
Dallas
Dawson
Deaf Smith
DeWitt
Dickens
Dimmit
Duval
Ector
Edwards
Ellis
El Paso
Falls
Fisher
Floyd
Foard
Fort Bend
Frio
Gaines
Galveston
Garza
Gillespie
Glasscock
Goliad
Gonzales
Grimes
Guadalupe
Hale
Hall
Hansford
Harris
Haskell
Hays
Hemphill
Hidalgo
Hockley
Howard
Hudspeth
Irion
Jackson
Jeff Davis
Jim Hogg
Jim Wells
Jones
Karnes
Kendall
Kenedy
Kent
Kerr
Kimble
Kinney
Kleberg
Knox
Lamb
Lampasas
La Salle
Live Oak
Loving
Lubbock
Lynn
McCullough
Menard
Midland
Milam
Mitchell

Moore
Motley
Nolan
Nueces
Parmer
Pecos
Potter
Presidio
Reagan
Real
Reeves
Refugio
Robertson
Runnels
San Patricio
San Saba
Schleicher
Scurry
Sherman
Starr
Sterling
Sutton
Swisher
Taylor
Terrell
Terry
Throckmorton
Tom Green
Travis
Upton
Uvalde
Val Verde
Victoria
Ward
Webb
Wharton
Willacy
Williamson
Wilson
Winkler
Yoakum
Zapata
Zavala

DEPARTMENT OF JUSTICE

Washington, D.C. 20530

On August 6, 1975, the Voting Rights Act Amendments of 1975, Public Law 94-73, were signed by the President. Because our preliminary analysis indicates that your jurisdiction will be affected by this legislation, I wish to direct your attention to the major provisions of the new law, which we recognize are complex, and request that you provide us with the information necessary for the Attorney General to make certain determinations required by law. A copy of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1970 and 1975, is included.

The 1975 Amendments extend for seven years the coverage of certain jurisdictions under the so-called "special" provisions [1]of the Voting Rights Act of 1965, and make permanent the nationwide ban on the use of literacy and similar tests. In addition, *Section 4* of the Act as now amended expands the coverage formula for the "special" provisions of the Act to the states and political subdivisions in which: (1) more than 5% of the citizens of voting age were members of a "language minority" [2]on November 1, 1972; (2) election and

[1]The special provisions of the Act consists of (1) Attorney General power to dispatch examiners to register voters; (2) same with regard to observers to watch election day activities; and (3) the requirement that all covered states and counties submit new election laws to the Attorney General or the federal district court in D.C. for approval.

[2]Defined by the Amendments as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."

registration materials were offered only in English; and (3) less than 50% of the voting age citizens were registered to vote or voted in November, 1972. Determinations as to coverage under this formula are to be made by the Director of the Census and the Attorney General; are effective upon publication in the Federal Register; and are not reviewable in any court.

Jurisdictions covered by operation of Section 4 are now required to provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the language of the applicable language minority in addition to English. (Section 4 (f) (4))[3]. In addition, jurisdictions covered by Section 4 are subject to the "special" preclearance and federal examiner and observer provisions of the Act (Sections 5-9, 13, 14. See footnote 1 above.). Such jurisdictions may seek to terminate Section 4 coverage by bringing an appropriate action for declaratory judgment before the United States District Court for the District of Columbia (Section 4a).

In a similar but distinct requirement, the Act as now amended in *Section 203* bans for ten years English-only elections in states and political subdivisions where over 5% of the voting age citizens are members of any single "language minority" which has an illiteracy rate greater than the nationwide illiteracy rate. Illiteracy under the Act is defined as a failure to complete the fifth primary grade. Census figures indicate that the national illiteracy rate under this standard appears to be 4.6%.

The Director of the Census is required to certify those jurisdictions which are covered by operation of this

[3]If the language minority's language is unwritten, the covered jurisdiction is required to provide oral assistance.

Section 203 formula, and his determinations are effective upon publication in the Federal Register and are not reviewable in any court of law. A jurisdiction which is designated by this Section 203 formula is required to provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the language of the applicable language minority in addition to English. (Section 203 (c)). However, a jurisdiction covered by operation of this formula alone is not subject to the "special" preclearance and federal examiner and observer provisions under Section 4 of the amended Act, [4] and may seek to terminate the coverage of Section 203 by proving in an action for declaratory judgment in a federal district court that the illiteracy rate of the applicable language minority group in the jurisdiction has become equal to or less than the nationwide illiteracy rate.

The bilingual election requirements contained in Sections 4 and 203 are virtually identical; therefore, standards for compliance with these two sections will be the same, and compliance with one will satisfy both. Please note, however, that a jurisdiction covered by both formulae--as yours appears to be--would be required to terminate coverage under both sections in order to terminate its duty to provide bilingual election and registration materials.

Although the Director of the Bureau of the Census has not yet published his final determinations under the Amendments, preliminary data indicate that your jurisdiction falls within both the Section 4 and 203 coverage formulae of the Amendments with regard to

[4]See footnote 1 above.

the language minority group(s) referenced at the beginning of this letter.[5]

In order that we may determine, as required by Section 4 of the Amendments, whether your jurisdiction provided election and registration materials in only the English language in 1972, I am requesting that you inform me in writing within ten days of receipt of this letter whether your jurisdiction provided election and registration materials bilingually in November, 1972. If your jurisdicton provided such materials bilingually, please include supporting evidence to that effect.

If your jurisdiction is determined finally to be covered by either Section 4 or 203, the requirements for provision of bilingual election and registration materials become effective immediately upon our publishing in the Federal Register the list indicating that your jurisdiction is covered. We are presently drafting interim guidelines, which will also be published in the Federal Register shortly, outlining the Department's interpretation of the bilingual election requirements of the two Amendments. The interim guidelines are intended for use by covered jurisdictions in complying with the requirements of the Amendments until permanent guidelines are published. Permanent guidelines may modify the interim guidelines, and comments on your experience with the interim guidelines are therefore solicited. As soon as the interim guidelines are prepared for publication, a copy will be sent to you. We will also send you a copy of the determinations of the Director of the Census and the Attorney General which, as I have indicated, will be published in the Federal Register. Procedures for the Administration of Section 5 of the Voting Rights Act of

[5]See my attached letter to Vincent Barabba, Director, Bureau of the Census, outlining in detail the procedures to be used in making these determinations.

1965, a copy of which is enclosed, are already published in Title 28 Code of Federal Regulations, Part 51.[6]

If you have any questions regarding the 1975 Amendments, and their effect upon your jurisdiction, please contact Mr. Barry Weinberg, Deputy Chief, Voting Section of the Civil Rights Division (202--739-3168). In addition, we would appreciate your informing us of any upcoming elections in your jurisdiction which could be affected by the new amendments.

Sincerely,

By S/S
J. Stanley Pottinger
Ast. Attorney General
Civil Rights Division

[6]These procedures will require some technical amendments to conform to the 1975 Amendments. Their substance, however, will remain the same.

• • •

AN EXHIBIT ATTACHED TO THE MEMORANDUM OF FEDERAL DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS. (MEMORANDUM IS NOT REPRODUCED IN ITS ENTIRETY)

ATTACHMENT 5
ANALYSIS OF VOTING PARTICIPATION IN 1954
IN STATES COVERED BY FY 1965 VRA

1965 Covered States	1964 VAP[1]	1964 Voted[2]	1964 % VAP Voted[1]	1964 No. Reg.[3]	1964 % of VAP Reg.	1964 % Reg. Who Voted
Alabama	1,919,000	689,817	35.9	NA	--	--
Alaska	153,000	67,259	43.9	NA	--	--
Georgia	2,634,000	1,139,157	43.3	1,669,778	63.4%	68.2%
Louisiana	1,894,000	896,293	47.3	1,202,056 (86.3 White)	63.5%	74.6%
Mississippi	1,207,000	409,146	33.9	NA	--	--
South Carolina	1,333,000	524,756	39.4	772,572	58.0%	67.9%
Virginia	2,539,000	1,042,267	41.1	1,305,383	51.4%	79.8%

[1]Series P-25, No. 526, U.S. Dept. of Commerce, *Current Population Reports*, "Projections of Population of Voting Age for States: Nov. 1974," Tables 3-4.

[2]*Statistics of Presidential and Congressional Election of Nov. 3, 1964*, Compilation by Clerk of U.S. House of Representatives; U.S. Gov't Printing Office, Washington 1965; 60-2140.

[3]Official State Reports of Registration Statistics provided to Justice Department by Secretaries of State.

CONTINUED IN VOLUME II

APPENDIX

VOLUME II

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,

Petitioners

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents

On Writ of Certiorari From The United States District Court For The District Of Columbia

---

PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1976

CERTIORARI GRANTED DECEMBER 6, 1976

VOLUME II

* * * * * (MOTION TO INTERVENE OMITTED)

* * * * * (APPLICATION FOR STAY PENDING APPEAL OMITTED)

* * * * * (ORDER DENYING STAY PENDING APPEAL OMITTED)

* * * * * (ORDER GRANTING SUMMARY JUDGMENT REPRODUCED AFTER TRANSCRIPT)

AFFIDAVIT INTRODUCED AT HEARING IN TRIAL COURT OMITTED. SAME AFFADAVIT WITH EXHIBITS REPRODUCED AT PAGE___ OF THE APPENDIX.

TRANSCRIPT OF HEARING IN DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DOLPH BRISCOE,
Governor of the State of Texas
and
MARK WHITE, Secretary of
State of the State of Texas,

Plaintiffs

V.

Civil Action No.
75-1464

EDWARD H. LEVI,
United States Attorney
General, et al.,

Defendants

Washington D.C.
September 12, 1975

The above-entitled cause came on for Hearing on Plaintiffs' Motion for Temporary Restraining Order before the HONORABLE GERHARD A. GESELL, United States District Judge, at 10:00 a.m.

APPEARANCES:

WILLIAM S. RHYNE, Esq.
DONALD CARR, Esq.,
Washington, D.C.,
JOHN W. ODAM,
Executive Assistant Attorney General
LONNIE ZWEINER,
Assistant Attorney General,
RICHARD J. BACIGALUPO, Esq.,
Austin, Texas,
Counsel for Plaintiffs

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:
MR. RHYNE

APPEARANCES:

BRIAN K. LANDSBERG, Esq.
CYNTHIA L. ATTWOOD, Esq.,
JAMES KEICKHEFER, Esq.,
Department of Justice,
Counsel for Defendants

GEORGE J. KORBEL, Esq.,
San Antonio, Texas,
Amicus Curiae

- - -

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Civil Action No. 75-1464, Briscoe, et al., v. Levi, et al. Mr. William S. Rhyne, Mr. John Odam, Mr. Lonnie Zweiner, Mr. Donald Carr, Mr. Richard Bacigalupo for the Plaintiffs. Mr. Brian K. Landsberg, Miss Cynthia L. Attwood, Mr. James Keickhefer for the Defendants.

THE COURT: Good morning, gentlemen.

Mr. Rhyne.

MR. RHYNE: Good morning, Your Honor. I would like to move the admission pro hac vice of two members

of the Bar of Texas, Mr. John W. Odam, Executive Assistant Attorney General, and Mr. Lonnie Zweiner, Assistant Attorney General.

THE COURT: I am delighted to have both of you for purposes of the case.

MR. RHYNE: Your Honor, Mr. Odam will open for Texas.

THE COURT: Before we start, I want to clarify the procedural status of this case.

The Defendants have moved to dismiss and they have opposed what they refer to as a motion for preliminary injunction. The Plaintiffs, on the other hand, have filed papers moving for a temporary restraining order. There seems to be, therefore, some confusion between the parties as to what the papers are in front of the Court.

Now, since the Plaintiffs' papers are in part addressed to a publication that has already occurred, I guess on the 9th of September, I have been wondering whether the way to treat these papers is not to treat the Plaintiffs' papers as an application for a temporary restraining order or a preliminary injunction. I understand you have some testimony that you wish to offer, and since the matters are mostly matters of statutory interpretation and there are affidavits filed and there will be, I understand, some factual material submitted to me by testimony, I was wondering whether the thing to do would be for me to treat the Government's motion to dismiss as a motion for summary judgment, to rule on some of the statutory issues, as I am authorized to do under Rule 12 of the Rules of Civil Procedure.

Now, is there any objection to that process here by either side?

MR. RHYNE: No objection, Your Honor.

MR. LANDSBERG: No objection, Your Honor.

THE COURT: Then what I really have before me is a motion for summary judgment by the Defendants or a motion to dismiss or a motion for summary judgment and an application for injunctive relief, either temporary or partial or permanent, from the State of Texas.

Is that agreeable to both sides?

MR. ODAM: Correct, Your Honor.

THE COURT: All right, then I will proceed in that fashion. It may, as we go forward, enable the Court to resolve the matter today; so that whoever is disappointed will have an opportunity to ride the elevator upstairs.

MR. LANDSBERG: Your Honor, one more preliminary matter.

I have been asked by Mr. Korbel to introduce him to the Court. He is the attorney for applicants for intervention.

MR. KORBEL: Reyes, et al.

THE COURT: I haven't even seen the papers.

MR. KORBEL: Your Honor, we filed those papers late yesterday afternoon.

THE COURT: I haven't seen them.

Have you seen them, Madam Clerk?

Do you have a copy of them? They weren't served in my chambers, as required under the rules.

THE CLERK: I know there were some papers served late last night. Miss Brown took copies of what were there but, apparently, they weren't there.

THE COURT: At least, I haven't seen these papers at all. By agreement with the parties, I received some papers from Plaintiffs at my home last night; and I spent some time on them.

This is an application by the Mexican-American Legal Defense and Education Fund?

MR. KORBEL: That is correct, Your Honor, on behalf of classes of Mexican-Americans and blacks in Texas to intervene as Parties Defendant.

I am sorry we inconvenienced Your Honor. We filed those yesterday afternoon and I inquired of the clerk whether there was anything else that we had to do; and she told us, no, Your Honor.

THE COURT: She was in error.

Do you have testimony you intend to present?

MR. KORBEL: If Your Honor permits, we do have testimony which we may offer. That would depend on what the State offers, I suppose.

I might represent to the Court that we have served all counsel, all opposing counsel with copies of this intervention and we notified them at least two days ago that we intended to intervene.

THE COURT: What relief do you want?

MR. KORBEL: We are intervening to support the Justice Department in their defense of this statute.

THE COURT: What makes you think the Justice

Department doesn't adequately take care of your interests?

MR. KORBEL: We don't know that at this point yet, Your Honor. The Mexican-American Legal Defense Fund has been quite active in taking actions on behalf of Mexican-Americans and blacks in Texas dealing with their problems in voting; and we feel that our particular expertise will be of help to the Court in determining this case.

THE COURT: I don't have any doubt about that, sir. I am concerned about the procedural difficulties that this presents for the Court. If you were to appear as amicus and I had given you an opportunity to present any arguments you wished, that is an easy matter. But if you are going to intervene, under the rules these parties have a period of time to oppose. Certainly the Plaintiffs, under our rules, have a period of time, what, ten days, or something like that, to oppose; and then we would have a hearing on the question of your intervention; and I would find myself in a position where I would not be able to go forward with these proceedings.

I am not at all sure that is in your interest.

MR. KORBEL: Your Honor, we would have no objection if Your Honor would allow us to appear as amicus and to cross-examine.

THE COURT: All right. I do want to have the benefit of anything you want to tell me but I think it would be far better if we treated it that way. When we get to the argument stage, if there is something you think should be brought out, you can bring it to the Court's attention.

MR. KORBEL: I appreciate it.

THE COURT: Is that all right?

MR. KORBEL: That is fine.

THE COURT: Is that all right with the other parties?

MR. ODAM: Yes, Your Honor.

THE COURT: We will do it that way. I am glad to have you here.

All right, sir, I think we had better get any testimony out of the way before we turn to any arguments. Don't you think so?

MR. ODAM: Whatever the Court wishes.

At this time we would call as our first witness, then, Mr. Mark White, Secretary of State for the State of Texas.

THE COURT: Plaintiff in this action.

MR. ODAM: Yes, Your Honor.

Whereupon --

MARK WHITE

was called as a witness by the Plaintiffs and, having been first duly sworn, was examined and tested as follows:

DIRECT EXAMINATION

BY MR. ZWEINER:

Q What is your name?

A Mark White.

Q What is your capacity with the State of Texas, Mr. White?

A I am the Secretary of State.

Q You are a Plaintiff in this lawsuit that is being heard at the present time?

A I am.

Q Mr. White, are you familiar with the Voting Rights Act of 1975?

A Yes, sir, I am.

Q Before we go onto that, as Secretary of State, is one of your duties the supervision of elections in the State of Texas?

A It is.

Q Now, Mr. White, with regard to the Voting Rights Act of 1975, this was, I believe, enacted into law on August 6, 1975, is that correct?

A I believe that is the date on which the President signed the Bill.

Q After the Bill was signed, did you attempt to get any information or hearing before the persons or agencies charged with the duty of enforcing this Act?

A Actually, when it became apparent that the Bill would pass the Congress, I had been informed that the President intended to sign the Bill, I immediately or at that time, July the 14th, wrote letters to Mr. Vincent Barabba, Director of the Bureau of Census, and requested an opportunity to appear at a hearing and provide testimony and evidence concerning the determinations his Bureau would be called upon to render, and also to ask for information from the Director of Census as to the methodology that he intended to utilize in making his determinations.

Q What capacity did the Bureau of Census have with regard to this Act? You talk about some decision that they had to make. What determination?

A Under the Bill, under the law, the Bureau of Census is required to determine the number of registered voters that existed in the affected states, the number of actual votes cast in the Presidential Election of 1972, and also the citizens of voting age that existed in the State of Texas on November 1, 1972.

THE COURT: That isn't what the statute says, is it? It says, persons of voting age. It doesn't say, citizens; isn't that right?

MR. ZWEINER: No, Your Honor, I believe that the Voting Rights Act of 1975 refers to, citizens.

THE COURT: We are talking '65. You are talking to him about the first Act. You have been asking him about the earlier situation, sir, not the '75 Act. You haven't asked him about that yet.

MR. ZWEINER: Your Honor, I beg your pardon. If I may clarify it.

BY MR. ZWEINER:

Q The questions I have asked have been about the 1975 Act; and if those questions were asked again, would your responses be what they have been with regard to the '75 Act?

A Yes, sir, they would be.

MR. ZWEINER: I am sorry.

THE COURT: It is the '65 Act, as amended. I am

clarified now. You are talking about things you did in '75?

THE WITNESS: Yes, sir, in July of '75 under the amended Bill.

THE COURT: Under the amended Bill. Fine, thank you.

Excuse me, gentlemen.

BY MR. ZWEINER:

Q Because the Director of the Bureau of Census had to make these determinations, you did seek a hearing or an appointment or information from him, is that correct?

A Yes, I did.

Q Are these attempts and possible letters that you have previously referred to made a part of an affidavit which has been attached to the complaint herein?

A Yes, it has.

MR. ZWEINER: Your Honor, by agreement, we offer the affidavit.

THE COURT: I am taking all of those in evidence. All the affidavits that have been filed here, all attachments are part of the record already in evidence.

MR. ZWEINER: Thank you, Your Honor.

BY MR. ZWEINER:

Q Would you then explain, just very briefly, what efforts you did make to contact the Bureau of Census and the Attorney General's office, which has, I believe, a duty and a function under the Act; is that correct?

A Yes, sir. I called and talked with several members of the staff of the Justice Department; called on several occasions and talked with members of the staff of the Bureau of Census Population Studies; and have written letters on July the 14th, July 21, a telegram to Vince Barabba, on August 7 a letter to Attorney General Levi, on August the 28th a letter to Assistant Attorney General Pottinger, Attorney General Levi and Director of the Bureau of Census Barabba; and on each occasion requested an opportunity to have a hearing and present testimony and evidence and also to make inquiry of the methods and techniques that these two agencies would utilize in arriving at the determinations that they are required to make under the 1965 Voting Rights Act, as amended in 1975.

Q What was the result of your efforts, Mr. White, to obtain a hearing?

A I was not offered an opportunity for a hearing. I was not given any suggestion that I would receive a hearing or any evidence would be received.

There was a telegram sent to me on September the 2nd, from Mr. Pottinger, advising that I would be given an opportunity for a fair hearing and to submit data and information to the Bureau of Census as soon as I would contact them.

Immediately upon receiving that telegram, I contacted the Bureau of Census and was notified I would have an opportunity for a meeting but not a hearing on September the 5th.

On my way to that meeting on September the 5th, I was notified by the Bureau of Census on September 4 that they had already made their determinations that I was attempting to submit information concerning.

That happened the day before the date on which they had intended or indicated they would permit me a hearing.

Q Had you had any knowledge at all that the Attorney General's office was considering including you in the Act before the hearing was granted?

A I had read press releases from the Justice Department, as well as the Bureau of Census, which indicated that they had already made their minds up concerning Texas' inclusion under the amended Act.

Q When was that?

THE COURT: It couldn't come as a great shock to you after reading the legislative history of this statute. Texas is on almost every page of the legislative history. There was no shock about that, was there, Mr. White?

THE WITNESS: No, sir, I wasn't--

THE COURT: You knew you had a problem right when the Act was signed; didn't you? That is fair to say.

THE WITNESS: Even before the Act was signed.

THE COURT: All right, fine, let's get on then.

I think it is conceded that you had no formal hearing. I don't think that is an issue.

BY MR. ZWEINER:

Q Now, did you attend this meeting on September 5 with the Bureau of Census?

A Yes, I did.

Q Who was present at that meeting, Mr. White?

A Along with me was a Dr. John Stockton, who is the former Director of the Bureau of Business Research of the University of Texas, Austin. A Deputy Director of the Bureau of Census was in attendance, as well as Mr. Meyer Zitter, head of Population Studies from the Bureau of Census, Mr. Gil Felton, a member of his staff, and Cynthia Attwood, a member of the Department of Justice staff, the Public Information Officer of the Bureau of Census, and one other individual, whose name I don't recall.

Q I believe Mr. Zitter has submitted an affidavit. Is that the same Mr. Zitter that submitted an affidavit in this case?

A Yes.

Q Did the Bureau of Census or any of its representatives or any representative of the Attorney General's office inform you as to how they determined that Texas was covered by the Voting Rights Act of 1975? I have special reference to the number of voters registered, voting, and voting age groups.

A I was informed that they did not need to know the number of registered voters in Texas. That had no meaning for their purposes. The only information they looked to was the number of citizens of voting age and the number of people who cast ballots in the Presidential Election in 1972.

THE COURT: Mr. White, in that connection, there is one matter in the Court's mind.

What is the status of active servicemen in Texas? Can they vote?

THE WITNESS: Military personnel are permitted to vote in Texas if they assume their

residency as being Texas. However, it is my understanding --

THE COURT: At the time the Act was originally passed, that was not the case; isn't that so?

THE WITNESS: At one time, several years ago, servicemen in Texas were not permitted to vote in Texas. They are permitted and were on the dates in question, I believe.

THE COURT: By '75, they were permitted to vote?

THE WITNESS: I believe also in '72 they were permitted to vote. I am not absolutely certain.

THE COURT: I think that is right. Perhaps there was some question in '65.

THE WITNESS: I don't think they were permitted to vote in Texas in '65.

THE COURT: That was the Court's understanding. Thank you.

BY MR. ZWEINER:

Q Mr. White, have you examined Mr. Zitter's affidavit which has been filed in this case?

A I examined it briefly on yesterday.

MR. ZWEINER: Do you have that, ma'am, that affidavit of Mr. Zitter?

THE COURT: It has been filed, Madam Clerk. I have a duplicate copy.

Here it is. This is Mr. Zitter's affidavit.

MR. ZWEINER: Thank you, Your Honor.

BY MR. ZWEINER:

Q Mr. White, I show you Mr. Zitter's affidavit. Do you agree with the figure he has for the number of persons who voted in the november 1972 election?

A I think that is a substantially correct figure.

Q I believe you informed us that they do not consider a figure for the number of persons that registered in Texas as being relevant; is that correct?

A That has been their consistent statement to me, yes, sir.

Q They don't have that figure, do they?

A No, sir.

Q What would that figure be for the year 1975? Do you have that?

A 1972 or '75?

Q Seventy-two.

A It would be in excess of 5,200,000 people.

If you would like, I can give you the precise figure.

THE COURT: No, that is all right.

BY MR. ZWEINER:

Q All right. Does his affidavit have a figure for the voting-age population?

A It has a figure for the voting-age population, yes, sir.

Q All right. And apparently in that affidavit he has

made a subtraction of a figure that he terms, aliens, and arrives at a voting-age population figure; is that correct?

A Citizens of voting age, yes, sir.

Q Citizens of voting age?

A Yes, sir.

Q Do you agree with that figure?

A I do not believe that to be an accurate figure.

Q Why don't you? Is it because the criterion or the methodology used in arriving at that figure you think is incorrect?

A I was informed by the Bureau of Census, as well as the Department of Justice, that all of the aliens existing in Texas on that date were not excluded from the computations.

Q Well, did they inform you specifically that no illegal aliens that may have been present in Texas were excluded?

A They informed that they did not exclude any illegal aliens in Texas from that number.

Q Is there any other dispute that you may have?

They do have a figure for legal aliens, apparently; is that correct?

A That is my understanding that their second figure is related to legal aliens.

Q What is that figure?

A 140,657.

Q Have you obtained information anywhere that would indicate that that figure might be erroneous?

A It is my understanding that a more precise figure would be available from the Bureau of Immigration and Naturalization Service and that the figure stated here is substantially below the figure you would receive if you were to ask the agency I previously mentioned.

Q Do you have copies of the official reports of the Bureau of Immigration and Naturalization with you?

A Yes, sir.

THE COURT: They are not in the case, are they, the Bureau of Immigration and Naturalization? Congress didn't give them any responsibility. It gave Census the responsibility; isn't that right?

MR. ZWEINER: Yes, Your Honor, but it is our contention that the Bureau of Census ought to get the best figures they can for aliens.

THE COURT: Where does the statute say that?

MR. ZWEINER: We say --

THE COURT: The statute doesn't say anything about the most accurate figures they can get. It says that they are to make a determination; isn't that right? That Census is to make a determination.

MR. ZWEINER: That is true, Your Honor.

THE COURT: All right, Census made a determination.

MR. ZWEINER: That is true, Your Honor. Of course, it is our contention --

THE COURT: There is nothing in the statute that contemplated a nose count, was there, or a special new survey or a special new census or anything like that? Nothing like that in the statute.

MR. ZWEINER: That is true.

THE COURT: They made a determination.

MR. ZWEINER: That is true but, again, Your Honor, if I may say, we do say that they must use their best information. In other words, if they got a 1970 Census figure, they had better use that rather than 1960. This would be action so arbitrary that Congress could not have intended for them to make such a determination.

We feel if they have got a fellow-Government Bureau that has those figures, those figures should be used. Your Honor, it is our intention to offer these reports, if Your Honor will receive them.

THE COURT: Certainly. I want you to make your record. I want to understand your position.

Do you have any figures on how many illegal aliens vote in Texas?

MR. ZWEINER: No, Your Honor, we do not.

THE COURT: It is fairly common knowledge that some do, isn't it?

MR. ZWEINER: Yes, sir.

THE COURT: Then what are we talking about? I don't understand what we are talking about. It is a matter of ballpark figures, isn't it? It is not a matter of precise nose count.

MR. ZWEINER: That is true, Your Honor, but we do say that there are much more accurate figures available.

THE COURT: I see your point. That Census didn't use the best available data.

MR. ZWEINER: Not only that, Your Honor, they didn't use available data at all in the case of illegal aliens. That was available.

I do offer these reports for the years 1972 and '73, Your Honor, for whatever purpose they may serve the Court.

THE COURT: I will receive them. We will give them Exhibit numbers, if you hand them to the Deputy Clerk before we are through. Reserve Plaintiffs' 1 and 2 for that.

(Whereupon copy of 1972 Annual Report of Immigration and Naturalization Service was marked Plaintiffs' Exhibit No. 1 and received in evidence.)

(Whereupon copy of 1973 Annual Report of Immigration and Naturalization Service was marked Plaintiffs' Exhibit No. 2 and received in evidence.)

BY MR. ZWEINER:

Q Mr. White, with regard to illegal aliens, His Honor has asked, do we have any information at all about that.

Do we have some information about illegal aliens in Texas, a figure that could be helpful to the Bureau of Census?

A Yes, I think so. The Department of Immigration and Naturalization Service has various rules and counting techniques as well as public statements made by the head of that Bureau, in addition, public statements made by the former Attorney General Saxbe, which I think bear directly upon the question of the number of illegal aliens existing on various dates in the State of Texas.

Q Do you have a figure of the number of aliens apprehended for any recent year?

A I am informed by the Management Analyst Officer of the Bureau of Immigration and Naturalization Service that in 1972 there were 209,912 aliens deported from Texas. In the year 1973, there were 244,395 aliens deported.

THE COURT: How many of them came back the same year, do you know? Isn't that your problem? They are in and out.

THE WITNESS: Yes, sir.

THE COURT: I am not being critical but you are confronting a condition you can't control; isn't that right?

THE WITNESS: The point where I feel that this is important is in relation to the number that the head of the Immigration Service states that this figure is merely a small number of those people actually in existence in the State at any one time. Their rule of thumb is at least four and as many as five times that number reside within the State, based upon the number

that they are actually deporting from the State.

MR. ZWEINER: Your Honor, Mr. White has copies of speeches by the head of the Bureau of Immigration and Naturalization and also one of Mr. Saxbe, the Attorney General, that addresses this question and the projection of the number apprehended into a four or five times figure.

May we submit those?

THE COURT: You may mark them. I will not receive them. Speeches by Mr. Saxbe are really a little far afield.

Mark them for identification as the next exhibit number.

MR. ZWEINER: Thank you, Your Honor.

THE CLERK: No. 3.

THE COURT: No. 3, but not in evidence.

(Whereupon copies of speeches were marked Plaintiffs' Exhibit No. 3, for identification.)

THE COURT: Figures differe depending on the purpose for which you make the statement.

MR. ZWEINER: Yes, Your Honor.

Your Honor, I can illustrate, I think, our purpose by asking Mr. White this question.

BY MR. ZWEINER:

Q Mr. White, did the Bureau of Census consider at all this Bureau of Immigration and Naturalization

figure of the number of illegal aliens apprehended?

A They have told me on repeated occasions they would not consider that and did not consider that.

Q Did they consider, in arriving at their figure for the number of citizens of voting age the prison or institutional population in Texas?

A They have told me that they did not exclude any convicted felons or lunatics within the State of Texas in their citizens of voting age computation.

THE COURT: What is the Texas law?

THE WITNESS: The Texas law is that lunatics, convicted felons, aliens and those persons under eighteen years of age are not permitted to vote.

THE COURT: When you say, convicted felons, do you mean Federally or state?

THE WITNESS: Either.

MR. ZWEINER: Either, as long as they have been convicted of a felony or a crime involving moral turpitude:

THE WITNESS: That also includes convicted felons in other states who move to Texas.

BY MR. ZWEINER:

Q Non-residents are not permitted to vote either, are they, Mr. White?

A That is right, non-residents.

Q Do you worry about this problem of non-residency with regard to the determination made by the Bureau of Census as far as citizens of voting age?

A Yes. It is a well-known fact, I think, that many of the military personnel stationed in Texas -- and Texas probably has the largest number of military persons stationed within its borders, within the state -- vote absentee in their home states and do not acquire citizenship for voting purposes in Texas.

Q Do you have a figure for the number of servicemen in Texas for the year 1972?

A I was informed by the Bureau of Census that that number would total approximately 166,000 people.

Q And they did not take this figure into consideration in any way in obtaining their figure for citizens of voting age; is that correct?

A I was told they did not.

THE COURT: Well, they include those people.

THE WITNESS: They were included, yes.

THE COURT: They were included as citizens of voting age because, a, they were citizens and, b, they were of voting age. Isn't that right?

MR. ZWEINER: That is true. However, Your Honor --

THE COURT: They decided to include them.

MR. ZWEINER: We are contending as a legal matter they should not be included. They are not really within the voting population of Texas. They don't vote there and they should not be included for the purposes of the Act.

THE COURT: I understand that, yes.

BY MR. ZWEINER:

Q Did they include non-resident students also in their figure?

A I am informed they did.

Q They do admit to a sampling error, don't they?

A The Bureau of Census, at the discussion I had with them on September the 5th, indicated that they did have a sampling error in their techniques for projecting numbers of aliens existing in the State of Texas at any time. I was also informed at that meeting that they would provide my office with that sampling error total.

Q They didn't know what the sampling error was at the time of the meeting, is that correct?

A They didn't have it available. They said they would make it available. They have not yet made it available.

Q Mr. White, for some purposes a five per cent figure is important when we are speaking of persons of Spanish heritage, is that not correct?

A Yes, sir. One of the determinations is those political subdivisions which have in their borders more than five per cent Spanish heritage population.

Q Now, is Texas treated differently in this regard than other states?

A It is my understanding, from a letter from Mr. Pottinger to Mr. Barabba, that Texas and two or three other states, Southwest states, are treated differently than the other states of the Union in computing Spanish heritage.

Q And that is explained in Mr. Pottinger's letter, which is attached to your affidavit; is that correct?

A Yes, it is.

Q Now, after your meeting with the Bureau of Census -- they, I believe, make initial determinations before the Attorney General is to act finally under the Voting Rights Act; is that correct?

A Would you state that again?

Q After your meeting with the Bureau of Census, did you seek a meeting with the Attorney General of the United States for a hearing on this question of Texas inclusion in the Voting Rights Act?

A I believe that I had made a concurrent request on August the 28th for such a hearing, yes.

Q Did you ever get a hearing?

A No, sir, I did not.

Q Did you ever meet with the representatives of the Attorney General's office?

A I did have one meeting, at which time there were members of other jurisdictions potentially covered by this statute that were present.

Q Was any testimony or evidence offered at that meeting?

A No, sir, there was no provision made for testimony or evidence or cross-examination.

Q Had you given the Attorney General --

MR. ZWEINER: Your Honor, I am a little handicapped in asking the questions since we haven't

had any argument. Mr. White is a lawyer.

BY MR. ZWEINER:

Q There is a determination that the Attorney General has to make with regard to a test or device to include Texas within the operation of the Act; is there not?

A Yes, that is one of the responsibilities under the statute.

Q And one of the test or device is the fact that the election is an English-only language election; is that correct?

A That is correct.

Q Is it your view that in making this determination the Attorney General must decide whether or not this English-only language election did have the effect of denying persons of Spanish heritage the right to vote?

A I think that was the purpose of the statute. It was to correct what ill effects a test or device might have, and if the test or device had no ill effects, then there would be no purpose in the statute and no purpose of inclusion of any voting subdivision under the sections of the statute.

Q Have you made any attempt to determine what if any effect an English-only language election has upon the persons of Spanish descent in Texas?

A The only test we have run -- and I think the only one that is particularly appropriate -- was to see how many people in Texas in those counties with great population concentrations of Spanish surnamed individuals actually voted, and to contrast those

counties against those other counties in Texas where almost no Spanish surnamed individuals reside.

Q You did make this comparison and study?

A Yes, I did.

Q What was the result?

MR. LANDSBERG: Your Honor, I object. I think the question relates to whether there has been discrimination rather than whether the determination of the Attorney General is correct. It is irrelevant.

MR. ZWEINER: Your Honor, it is our contention there are two things necessary to trigger the statute: The Bureau of Census must decide numbers to determine first whether a state is included within the Act, number of registered voters or number of persons actually voting; and secondly, there must be, to trigger the operation of the Act, a test or device which has been defined as an English-only election, which Texas has. We say that the Attorney General, in deciding coverage, also must determine whether or not that test or device, English-only election did result in discrimination; and further, whether or not this particular test or device that may have had some discriminatory effect, has been corrected. Whether there is, in effect --

THE COURT: There is no enforcement proceeding in front of me, is there?

MR. ZWEINER: No, Your Honor.

THE COURT: We are not concerned with the enforcement proceeding. Those are matters that would

come up on an enforcement order, wouldn't they?

MR. ZWEINER: That is true.

THE COURT: They don't come up here to me.

MR. ZWEINER: Your Honor, one of the reasons we are asking for an injunction here is Mr. White is going to face somewhere, as the election official of Texas, possible criminal prosecution.

THE COURT: Where do you find the criminal prosecution? I thought it was civil.

MR. ZWEINER: No, Your Honor, there are penal provisions in this Act.

THE COURT: There are penal provisions in this Act for what?

MR. ZWEINER: Well, they are for a number of things but there is a general --

Your Honor, this is not a copy that I am familiar with but there is the general Civil Rights Statute.

THE COURT: I understand the criminal provisions there.

MR. ZWEINER: He could be subject to that if he disobeyed some injunction that resulted from being included within this Act.

THE COURT: I also understand that.

MR. ZWEINER: Yes, sir.

THE COURT: That is what I said. That depends on an enforcement proceeding, doesn't it?

MR. ZWEINER: Yes, Your Honor.

Your Honor, I can finish up with Mr. White in about two minutes if you will permit this line of questioning for just a moment more.

THE COURT: Oh, certainly. I want to let you make your record, but I have some sympathy with the objection.

MR. ZWEINER: Yes, Your Honor, I understand. Thank you.

BY MR. ZWEINER:

Q I believe, if I am correct, that you took counties that had over fifty percent Spanish surnamed people and counties with under five per cent in making your comparison, is that correct?

A That is correct.

Q Did you find any significant difference in those counties in voter turnout?

A There was a seven per cent total difference between voter registration in those segments of counties or groupings of counties; and based only upon voter turnout, there was less than one-half of one per cent difference in voter turnout.

The thrust of this is that there was actually a higher rate of voter turnout in those counties with higher Spanish surnamed population than there was in those of almost no Spanish surnamed populations for the general election of 1974.

Q Thank you. What does one have to do to register in Texas, Mr. White?

A Assuming qualifications under the law, you may register to vote by filling out a piece of paper supplying

all of the correct information and mailing it to the voting registrar in the county in which you reside.

Q This can be done by mail?

A Yes, sir.

Q What has the State of Texas and what have you or any of your predecessors done to insure voter participation in Texas and to insure there is no discrimination between races?

THE COURT: Is that issue in front of me?

MR. ZWEINER: Your Honor --

THE COURT: I wish you would explain why it is in front of me. I don't view it in front of me.

MR. ZWEINER: Your Honor, we get to it in this fashion: The Attorney General, after he receives the information from the Bureau of Census, must determine whether or not a state is covered.

THE COURT: Yes.

MR. ZWEINER: In doing that, he examines the state and its political system to determine whether a test or device has been used.

In the State of Texas, he determined that such a device as defined by the statute has been used, English-only election, which we have been having for a hundred years. But the Attorney General must, we say, determine whether that device has been discriminatory; and even if it has been discriminatory, if the discrimination has been abated by state action, we say that there is no reason to include the state.

THE COURT: The statute gives you a bail-out provision.

MR. ZWEINER: Yes, Your Honor.

THE COURT: If that is the situation, you can institute a bail-out proceeding, as I understand it, and go to that.

All that has happened is to a degree there is a shifting of burden based on the statistical showing. Now, you have all the rights in the world to come in and bail yourself out.

MR. ZWEINER: That is true, Your Honor.

THE COURT: But this is not a bail-out case. I am not involved in determining whether or not there is discrimination in Texas. That is something that I wouldn't have scheduled a hearing for an hour or two. You schedule a month or two.

You have those rights under the statute which you can exercise.

MR. ZWEINER: That is true but we say that Congress, in passing the statute, must have intended for the representatives that it chose to enforce the statute to have acted on a rational basis and that these particular standards that I have just discussed are a part of that rational basis decision making determination that must be made. Otherwise, the statute would be unconstitutional.

THE COURT: If you have got a constitutional argument, the statute requires you to ask for a three-judge court; and you haven't done so.

MR. ZWEINER: I am not making that argument.

THE COURT: Except you are talking about constitutional interpretations of the statute; and that is for a three-judge court. It isn't for me.

MR. ZWEINER: That is true but we say Your Honor can decide that the statute if applied is constitutional; and that can be the function of Your Honor.

THE COURT: No, I won't do that. I don't intend to and I don't consider that before me.

MR. ZWEINER: All right, Your Honor.

THE COURT: The constitutional questions, certainly under this statute, are three-judge court cases, both as to application of the statute and as to its terms.

MR. ZWEINER: O.K., Your Honor.

THE COURT: Otherwise, we are just avoiding the clear intent of Congress that those matters should be determined by a three-judge court.

MR. ZWEINER: Your Honor, as far as bail-out is concerned, it would seem to conserve judicial resources it would be almost absurd for these particular factors we have been talking about not to be considered here because then we could move tomorrow, I suppose, for bail-out; and if the Attorney General is applying the statute improperly, I would think that Congress might have intended that that be determined here before one judge as we are doing.

Your Honor, I have one other question and it deals actually with what Texas has done to insure voter participation by persons of Mexican descent. If the Court will permit me to make that part of the record, I

will be through.

THE COURT: Yes, you may ask the question.

MR. ZWEINER: All right, Your Honor, thank you.

THE COURT: But with no thought that I am going to determine the question of discrimination.

MR. ZWEINER: O.K., Your Honor, thank you.

BY MR. ZWEINER:

Q What has Texas done to insure that persons of Mexican descent do get the opportunity to vote?

A Well, since 1972, under directive of the Secretary of State's office, there has been oral assistance given to any person who was not able to read a ballot as printed and from that date on --

THE COURT: So that in the November election involving amendments to the Constitution of Texas, somebody is going to talk to one of these individuals that can't read English and explain to them what the constitutional provisions are?

Now, really, there will probably be years of litigation as to what they mean after they are written in English and everybody thinks they can understand it.

You are not going to have a ballot now in Texas -- except for this action -- that is written in Spanish?

THE WITNESS: Oh, yes.

THE COURT: And all the terms of the constitutional provisions are going to be written out in Spanish?

THE WITNESS: Oh, yes.

THE COURT: And handed to all voters?

THE WITNESS: Yes, sir.

THE COURT: I was advised to the contrary when you came in on the TRO in chambers, that that would cost you $1,500,000, or something like that and you didn't want to do it.

That is what I understood was the thing that made you so concerned about this development; you didn't want to go to the expense.

MR. ZWEINER: Your Honor, we are perfectly willing to distribute these Spanish ballots and constitutional provisions to Spanish-speaking people that need them. But the Department of Justice, as I understand it -- is this correct -- wants us to submit them to every household in the State of Texas without regard of whether they are of Spanish descent.

BY MR. ZWEINER:

Q Is that correct?

A That is the suggestion which they said we would have to submit a very high level of evidence to overcome the burden of proof.

THE COURT: Well, that is in negotiation.

THE WITNESS: I think possibly I may have misled the Court or the Court did not understand my statement.

THE COURT: Assume the latter and explain it to me.

THE WITNESS: The directive of the Secretary of State's office that I mentioned was a directive issued by my predecessor in 1972, which provided for oral assistance in all elections for those persons who were unable to read the ballot for any reason.

Since that time, the State has adopted, in the past session of the Legislature, a bill, Senate Bill 165, which provides for Spanish-language registration and voting materials to be supplied to those counties which have more than five per cent Spanish surnamed individuals.

THE COURT: Yes.

THE WITNESS: That is a state law. In addition, in compliance with that law, the Secretary of State's office has been required by the Legislature to publish a document, a tabloid, explaining the new constitution as proposed. That tabloid is legislatively directed to be distributed to every residential household in the State of Texas.

That particular tabloid is in English. On the face of the tabloid is a Spanish statement which indicates how a copy of that tabloid in Spanish can be obtained, both by writing and by toll-free watch line.

In addition, our office has contacted members of Mexican-American community organizations within the community, the television, news and print media, to supply in Spanish this information of the availability of the Spanish tabloid.

In addition, we are asking various food markets and convenience stores to have these available in areas where they can be readily picked up by the people in our state who can best utilize them.

THE COURT: What is the problem that leads you

to want to come in and ask for a temporary restraining order? What are you concerned about with this publication that is coming? What troubles you?

THE WITNESS: The suggestion made is that our efforts do not comply with the statute even though we feel like we have directed sufficient resources to see that those persons within our state who can best utilize these Spanish-language materials have them readily available.

The suggestion was made, Your Honor, that we would have to submit one Spanish copy to every residential household in Texas. That would impose a financial burden of approximately a half a million dollars which, as this office does not have any source of funds, would require a special session of the Legislature which best estimates indicated in past sessions have cost a minimum of $2,000,000, no matter what minimum length of time they meet.

THE COURT: When the matter came on for TRO in chambers, before we set these proceedings down, there was an indication that the Department of Justice recognized that as far as your November election is concerned, given the shortage of time, that they were prepared to discuss with your people procedures which might not go to the absolute extent of the implications that you see in this action.

It was the Court's understanding that there was a disposition to recognize that the jump to total compliance, as Justice sees it, may not be possible by November 4. That issue is an issue as to money and how that can be resolved.

But from what you are saying, I take it the determination that you must have a bilinqual election

doesn't trouble the State at all because the State already has one.

Isn't that what you are saying to me?

THE WITNESS: Under state law, we feel like the bilinqual statute has been complied with. Under the Federal statute there are grave doubts. The Justice Department might impose guidelines that we would be unable to comply with under the Federal statute.

THE COURT: If you bail out under the bail-out provisions, that wouldn't be so. Having been triggered by the statistics, you bring an appropriate bail-out proceeding and satisfy the Justice Department of your good faith and compliance and those provisions wouldn't be applicable to you. Isn't that right? Isn't that what the statute contemplates?

THE WITNESS: I don't know that we have time for a bail-out suit between now and November 4.

THE COURT: No, I mean, long-range that is clear, isn't it? Long-range, that is what the statute contemplates.

THE WITNESS: Yes, sir.

THE COURT: All right, thank you.

MR. ZWEINER: Your Honor, I have no further questions.

THE COURT: You may examine, Mr. Landsberg.

CROSS EXAMINATION

BY MR. LANDSBERG:

Q Mr. White, you did meet with Mr. Pottinger and

members of his staff and other individuals on August 26, 1975 to discuss implementation of the Voting Rights Act; is that correct?

A I was in a closed meeting with those individuals, I believe, at which time there was no opportunity to even make a transcript of that meeting. I was not permitted to take any materials from that meeting.

Yes, I was in a meeting.

Q And that meeting lasted about four hours; is that correct?

A I think that is true, yes.

Q At the meeting, the main topic of discussion was interim guidelines that the Department of Justice was fashioning to help states cope with the difficulties caused by the timing of the Act passing in August, the determinations being made in September and the election being held in November; is that correct?

A That was the purpose that I was informed of when I arrived at the meeting.

Q At the meeting there was discussion of alternative means of complying with the statute besides furnishing a copy of the new constitution in Spanish to every household; is that correct?

A Let me preface this. My attendance at the meeting was what I thought was an indication by the Justice Department to offer a hearing that had been requested on the threshold matters involved in the determination of whether or not certain factors existed in Texas and also to express our position concerning the interpretation of that statute.

Only after arriving at the meeting did I know the subject matter was not to be that hearing that I had requested. The matters that were discussed I think were discussed, you know, on the subject matters you suggested.

Q Now, at the meeting which you held with the Bureau of the Census, do you recall that at that meeting you mentioned that the Census Bureau had on the previous day issued a press release?

A Yes, I sure did mention that.

Q And Mr. Zitter --

THE COURT: I am sure you did.

BY MR. LANDSBERG:

Q Mr. Zitter stated to you that the purpose of the meeting was to see whether you had any materials that would help the Census Bureau make its determination and that he stated that: There is nothing we have put out yet that precludes us from making changes.

A I was also led to believe there would be no issuance in the Federal Register until certain events had taken place that had been offered by the Bureau of Census.

Q Mr. Zitter stated also that the notifications in the Federal Register will be next week, is that correct?

A He indicated that we would receive information on sampling error before any publication in the Federal Register would be made.

Q I don't think you have responded to my question.

A Yes, he did say publication in the Federal Register would be late next week and that publication

came on Tuesday after our Friday meeting.

Q He also said that the purpose of the meeting was to determine whether you had any additional information that might change the determination of the Director?

A I have not --

MR. LANDSBERG: May I approach the witness, Your Honor?

THE COURT: Yes.

(Whereupon document was submitted to the witness.)

BY MR. LANDSBERG:

Q Mr. White, were you allowed to record that meeting?

A I was permitted to record this one. The Justice Department had some reluctance on me recording the meeting in their office.

Q You made a transcript of the tape recording, is that correct?

A This was an effort on the part of our staff to try and transcribe that.

Q I am referring you to that transcript now.

A I would be glad to read it, if you like.

Q All right. That paragraph (indicating).

A All right.

"Zitter: That as I see, my purpose here today is to see whether there is any materials you have that would

help us decide and to make a determination is, that is, basically, the population estimates and making a determination of the per cent voting should be given from what we came up with and there is nothing that we have put out yet that precludes us from making changes. This is a press release of our findings. The notifications of the Federal Register will be next week."

Zitter later says:

"Towards the end of the next week, even if it goes in the Register, if we find that on the basis of evidence that our arithmetic is wrong or there is a better set of data available, we are not precluded from making changes but, you know..."

Do you want me to quit?

Q Yes, sir.

Mr. White, prior to the passage of the Texas Bilingual Election Law, were there any Spanish-language ballots in Texas?

A Not to my knowledge. You are talking about the Texas Bilingual Law, right?

Q Yes, sir.

A That is correct. That law, when passed, had immediate effect; and since that date there have been bilingual ballots in every election in Texas covered by the statute.

Q In the November 1972 election?

A No, there were none. There was no legal or Federal requirement of any of that.

Q What is the triggering mechanism of the Texas Bilingual Election Law?

A Triggered by a political subdivision which has, according to the 1970 Bureau of Census population figures, a Spanish surname population of five per cent or greater.

Q That includes population of prisioners and military aliens, is that correct?

A The statute talks of population of Spanish surname as determined by the Bureau of Census 1970 figures; and that is the decision that was made to trigger coverage of that statute. It has no relationship to citizenship and makes no reference to citizenship in the statute.

Q The vote totals which you referred to in Mr. Zitter's affidavit of the vote in Texas in the November 1972 election were furnished by your office; is that correct?

A Yes, I think that is substantially the correct number. It seems like every time that question is posed there may be three or four votes changed but no more than that.

Q Does that figure include absentee ballots of Texas students and Texas military personnel who are temporarily out of the State?

A To the extent that they vote in Texas, it should include that number.

MR. LANDSBERG: I have nothing further.

THE COURT: Anything further?

MR. ODAM: No, Your Honor, not on this witness.

MR. KORBEL: Your Honor, I have a couple of questions, if I would be allowed to ask them. Very short.

THE COURT: I hadn't anticipated you would engage in questioning, not being a party. You can bring any matter to my attention later in the way of argument. I want to hear you on argument.

MR. KORBEL: Thank you.

THE COURT: Thank you very much, Mr. White.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: Will you have any other testimony?

MR. ZWEINER: We have no further testimony, Your Honor.

THE COURT: Are you going to have any testimony on your side, Mr. Landsberg?

MR. LANDSBERG: No, Your Honor.

Mr. Zitter is here. We understand the Court to have received his affidavit.

THE COURT: I have taken his affidavit.

MR. LANDSBERG: Yes. I would merely like to point out a minor factual error in his affidavit.

THE COURT: Then I need mine back. Somebody took mine from me a while ago. I want to correct the actual affidavit.

Mr. White, may I have it? Thank you.

Yes?

MR. LANDSBERG: On the first page of his affidavit, he states that he served in various capacities in

the Population Division for twenty-seven years. The correct number should be twenty-four.

THE COURT: I take that not to be a material change.

All right, then we will go to a discussion of the issues on the record that we have. The record is closed on both sides; is that correct?

MR. ODAM: Yes, Your Honor.

THE COURT: Agreed, Mr. Landsberg?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: All right. I will be glad to hear you, gentlemen.

MR. ODAM: May it please the Court, my name, again, is John Odam.

It is the Voting Rights Act of 1965, Your Honor, which we have been discussing today by way of Mr. White's testimony, with its most recent amendments, with the amendments signed into law August 6.

We are here today, in our opinion, to focus on two very narrow points of law. They pertain to Title 2 of this Act. That is, number one, the initial determinations that are to be made under Section 4 of Title 2 by the Director of the Bureau of Census and by the United States Attorney General.

As this Court is aware, under Section 4, before the Act can apply to the state, as brought out in this testimony, these two determinations must be made: I will not go into any great detail but, generally, the first being the test or device that would have to be determined by the Attorney General; and second of all,

the additional determination to be made by the Director of Census, less than fifty per cent of the citizens of voting age were registered on November 1, 1972 or that less than fifty per cent of such persons voted.

The section further states that once these determinations are made and become effective by publication in the Federal Register, they are not reviewable in this or any other court.

As I said, our position is quite simple: First, that before these officials can make these determinations, they must hold public hearings and consider all relevant testimony and evidence.

The evidence, by way of Mr. White's testimony thus far, has indicated this was not done. As Mr. White indicated, he attempted on numerous occasions to request formal hearings to present evidence by way of testimony and other written information that he had available.

If the non-judicial review of the law is to stand, then clearly a determination must be made by the Director of the Census Bureau that is not arbitrary, that is not capricious and unreasonable.

We consider, Your Honor, that a determination that must be made under this Act must be a determination made in consideration of all the relevant testimony.

The Court asked the question earlier of Mr. White, or of Mr. Zweiner, rather, he must make a determination. This is certainly true. That determination must be made but it is our position, Your Honor, that when that determination is made, that determination must take into consideration all of the relevant evidence. And I believe that Mr. White's

testimony indicated that, obviously, certain data was not taken into consideration.

That brings up the second portion of our case; and that is the construction that is necessary for the benefit of the Justice Department or for the benefit of the Director of the Census Bureau as to whether or not they should take this into consideration.

For example, Mr. White would want to present evidence on the number of illegal aliens, the number of students, the number of military, to the extent, as indicated, whether or not Texas has discriminated in the past. This was not accepted. The reason for this, as we understand it, is because the counsel for the Director's office advised him that they were not citizens of voting age.

It is our position that when this Court looks at the term, citizens of voting age, and when the Director's office looks at, citizens of voting age, you must consider and they must consider citizens of voting age who have a right to vote.

In this most recent amendment the word was used, "citizen" rather than as in the latter portion of the Act that contains, "person." Now, this must have a meaning, as indicated by the testimony and by the affidavits and by the Justice Department's admission they would certainly realize that legal aliens should not be counted in counting the number of citizens. Why? Obviously, we know why. Because they are not citizens under our laws.

They say they would not count illegal aliens, not attempt to count illegal aliens, because it is too difficult. As the Court indicated earlier, yes, illegal aliens move in and out. But the point they make, no attempt has been

made, as we see it, to determine and make an estimate as to these illegal aliens.

The second portion is again an interpretation and construction of this statute with regard to the citizens of voting age; and it calls for interpretation of what we mean by citizens of voting age.

If the purpose of this Act is to protect voting rights, which, obviously, we in the State of Texas want to do, you must look to see whose rights are being protected.

Why would a determination need be made as to how many people there are in Texas who have no right to vote in Texas? If you are making a determination as to whether or not fifty per cent voted or whether or not fifty per cent registered, then clearly, you would look at those people, in our opinion, who have a right to vote in Texas.

THE COURT: You mean who registered?

MR. ODAM: Those who have registered, yes, Your Honor.

THE COURT: Well, we have known situations where a lack of registration reflected discrimination right there; haven't we?

MR. ODAM: Yes, Your Honor.

THE COURT: The broad scope of the Act went beyond that, didn't it?

MR. ODAM: Yes, Your Honor.

THE COURT: That is why I have trouble with that argument.

MR. ODAM: Well, the point is, we believe, Your

Honor, in making the determination, that you cannot take as the total amount of persons counted, the fifty per cent of the total amount to include persons who obviously will not be able to vote in Texas.

Now, again, maybe this comment that I make is not responsive to your concern. Maybe I will again try to respond to the Court's concern.

THE COURT: Well, you would say that if the felons, for example, incarcerated in Texas Federal or state penitentaries are not able to vote because of Texas law which carries over to Federal law, that they shouldn't be taken into account?

MR. ODAM: That is correct, Your Honor.

The same with respect --

THE COURT: Or lunatics or people like that.

MR. ODAM: The same with respect to students who have no right to vote in Texas. Again, because if you look at the entire Act --

THE COURT: They have a right to vote in Texas. Some of them have chosen not to.

MR. ODAM: That is correct. If, as a matter of law, the Justice Department and the Director of Census make no attempt to decide how many students there are, then that issue is never raised. In other words, as of right now, unless this Court determines otherwise and gives instructions that you will at least make an attempt to determine how many students there are, they will continue to count the noses, to use the phrase the Court used earlier.

Simply, our position is if two determinations must be made which are not subject to review, as to the total

number of citizens that would put Texas under this Act, then that determination must be made with respect to or at least try to determine how many citizens or how many people in Texas of voting age have a right to vote.

In other words, the Director should at least make an attempt to estimate how many of these there are. Perhaps these estimates that would be made in arriving at this determination would then be the factual evidence.

As the Court indicated in chambers the other day, we would not perhaps want to get into or perhaps would be prohibited from getting into challenging whether or not their estimates are right at a later point. But I feel at this point they simply take the legal position that they will not count aliens, legal or illegal, and will not count the others.

If we were at the point of determination in this Court of a determination that became effective, I think at that point those estimates could perhaps not be challenged; but the thing that could be and is being challenged today -- at least a legal determination -- is whether or not those citizens should be counted.

THE COURT: To put it another way, whether or not Census has correctly, or at least not arbitrarily, rationally interpreted the statute.

MR. ODAM: That is correct, Your Honor.

THE COURT: And you say that in spite of the non-reviewability provision of the Act relating to Census publication, that the Court has jurisdiction here, because this is a genuine controversy and because it is a Federal question, to determine that at least pre-publication.

MR. ODAM: Oh, yes, sir, definitely.

THE COURT: And that the non-reviewability provision did not take away the jurisdiction of the Court to interpret the meaning of Congress in the abstract at least.

MR. ODAM: Yes, sir, that is exactly what we are saying. I don't think that we reach the point necessarily today of the phrase, that once the determination is made and becomes effective, it is not subject to review. We are not quite to that point yet because they haven't made at least the next determination of citizens of voting age.

I do think this Court does have the jurisdiction, as we discuss in our brief, to make the legal determinations and give directives by way of a Court order, for example, by way of a temporary injunction or preliminary injunction order, that the Director of Census and the Attorney General be preliminarily enjoined from making the determinations and publishing them and making them effective until such time as they consider how many aliens there are, how many NCM's, how many students, and so forth.

THE COURT: Let me ask you this, which is an aspect of this which concerns the Court.

The legislative history is all over the lot with this statute, like many statutes of this kind, with a large number of people interested in many hearings. If you dig into it deep enough, you could prove almost anything or at least give a suggestion of almost any result.

Is it not reasonable to assume that Congress left to the expertise of the Census Bureau the job of making these determinations based on its experience and that all that Congress was doing was not saying that these

determinations are absolute in the sense that once they are made they are not subject to appraisal as to their weight and significance; but they said, where these determinations are rationally made, then the burden shifts, in this case to the State of Texas, to come forward and demonstrate that the elections in the State have not been inconsistent with the purposes of the Act; and that all we are talking about is something that starts the process and shifts the burden.

Certainly with a bail-out provision, there is nothing in the statute that says that regardless of the figures, if the current practices are adequate to meet the requirements of the Act, that enables you to bail out, whatever the history may have been at the time the figures were prepared.

So the figures are simply, as counsel called it, a triggering mechanism to get the process under way.

Isn't that a rational approach to the statute; and if not, why not? I take it you don't think it is.

MR. ODAM: No, sir, I would agree with what the Court says and I think the key word that I think the Court inserted, and which we think is at this point very crucial to our case, is the word, rational. Not the rational way to consider your argument but the rational determination they must make.

Our position is, a rational determination, as you stated, was intended to be made by Congress by the Director of the Census Bureau, a rational determination cannot be made if as a matter of law they consider certain groups of people; and, second of all, a rational determination cannot be made if they will not attempt to seek out and obtain evidence as to how many citizens those are.

THE COURT: You mean it isn't rational for Census to rely on its own figures and that it should read Saxbe's speeches?

What about that? That is one of the arguments that was presented to me by your witness. I don't understand why it isn't rational. I don't mean to do more than point out that perhaps Census says: We are going to go on our own records and nobody else's. That is why Congress intended. We are not going to look at Immigration. We are not going to look at what Texas says. We are not going to look at what Saxbe says. We are going to look at our own records. We have the job. We were given the job by the Congress and we are going to go on our own records.

Isn't that a rational view?

MR. ODAM: Yes, sir, but before you reach that point, I think part of the reason we are here is for this Court to clarify to the Director whether or not he should consider as a matter of law as citizens of voting age these groups.

If this Court were to decide, yes, sir, you would consider as a matter of law citizens of voting age includes aliens, NCM's, felons, and so forth, then perhaps what you are stating is so, they can look in their desk drawer, look inside their own office and make that determination.

First of all, as a matter of law, this Court should clarify whether or not they should consider exclusion of those groups of people. That is what we are asking for this Court to clarify.

THE COURT: I think that is well stated counsel and I think that is correct. These arguments become very circular. How am I to determine that, by the

language of the statute?

MR. ODAM: The language of the statute.

THE COURT: They have taken, citizens of voting age, haven't they?

MR. ODAM: Sir?

THE COURT: They have taken, citizens of voting age.

MR. ODAM: They have taken citizens of voting age.

THE COURT: Lunatics and felons are citizens of voting age.

MR. ODAM: But they are including citizens of voting age who do not have full citizenship rights. Again, it calls for an interpretation of the statute and the purpose of the statute.

Again I come back to the point I made earlier, if the purpose of the statute is to be triggered because a determination has been made that less than fifty per cent of the population did not vote, then it is our position that Congress intended that you consider, just like when they use the word, "citizen," that you look to the number of persons who have voting rights in Texas. Those are persons whose rights are intended to be protected.

THE COURT: There is nothing before me that suggests even if your interpretation and figures were accepted, the results wouldn't be the same. I have no evidence here at all that if all your interpretations were accepted, you would have a different result.

MR. ODAM: That evidence could be presented to this Court.

THE COURT: It hasn't been. The record is closed.

MR. ODAM: If this Court were to state the determination must be made considering exclusion of these groups, we would suggest that that determination could be made by the Director of the Census Bureau. It is not published in final yet.

In other words, this Court could say: Director of the Census Bureau, Mr. Barabba, you made your determination but I am directing you as a matter of law in making your determination you, when considering citizens of voting age, will take into consideration evidence of how many groups of these people should be excluded.

Mr. White could present evidence at that hearing, at that determination; and we would say at that determination Texas would not be under the Act.

No, we did not put on a full portion of evidence to show that if all these figures were presented -- because we think that the first point is whether as a matter of law in making the determination, the Director of Census should include or exclude these persons in Texas who do not have full voting rights.

THE COURT: So that is something that really is to be determined without regard to the figures from a reading of the statute, the language of the statute.

MR. ODAM: From the reading of the statute, we believe. As I said earlier, the first portion of the statute spoke in terms of, persons. I would say, looking at the earlier portion that was admitted, persons, that is everybody, that is the nose of everybody in Texas over voting age. But when they amended it, they said, citizens. I think the Court can say, they intended,

citizens, not everybody.

THE COURT: How can I say they meant citizens of Texas?

MR. ODAM: I think that the Court would have to say that the purpose of this statute is obviously to protect the voting rights. It protects the voting rights of those persons in Texas entitled to vote. Therefore, when looking at the phrase, citizens of voting age --

THE COURT: I think there is a larger purpose to the statute, isn't there, and that is to encourage people to vote wherever they are, whenever they want to.

MR. ODAM: Yes, sir. But I do not think --

THE COURT: Who has and who hasn't isn't the whole test.

MR. ODAM: Well, who does not have the right to vote, who cannot under the law vote in Texas, those persons, we believe, were not intended to be protected.

I am talking about the NCM's; I am talking about the illegal aliens.

THE COURT: I have that in focus.

MR. ODAM: As I said, the two main issues, then, would be whether or not as a matter of law in making this determination -- as the Court stated, it must be rational. It is our position that, yes, that determination by the Director and by the Attorney General must be a rational determination. In making that rational determination, the Director must take into consideration all of the evidence with respect to determining how many citizens of voting age there are.

That is the first legal issue; whether or not he must

inquire, must have a hearing, and so forth.

The second issue before the Court is a matter of statutory construction, in giving advice and counsel to the Director of the Census Bureau, as to whether or not, in making that rational determination, he is to include a count of all the people in Texas or whether or not he should exclude those citizens in Texas, those persons in Texas who do not have full voting rights.

It is our position that, number one, he should not include those persons who do not have full voting rights. That was not the intent of the entire Act and it was not the intent of this revision. Second, once that determination is made, he should exclude those persons. Then, of course, to make a rational determination of who he is going to count, he should take into consideration the evidence presented of how many of those persons should be excluded from the total population that he would come to by Census count.

THE COURT: I think that is a very clear statement of your position. I do believe, from the briefs, I have it in focus. You have been very helpful, as has Mr. White.

I will give you a chance to respond unless you have something else you want to tell me now, after I hear from the Justice Department.

MR. ODAM: No, Your Honor. Thank you very much.

THE COURT: All right, Mr. Landsberg.

MR. LANDSBERG: Your Honor, I first wanted to address the question of the reviewability at this stage or at any stage of the determinations of the Director of Census and the Attorney General.

The statute specifically --

THE COURT: Now, wait. I need your help. Is it a question that I am being asked to review the determinations or rather is it a question that I am being asked by declaratory judgment to interpret the language of the statute?

You say I have no jurisdiction to do the latter?

MR. LANDSBERG: Your Honor, as we read the statute, that is correct.

THE COURT: It is one thing reviewing computations and figures, and another question as to whether a Federal Judge does not have, absent an express statement by Congress that the judge doesn't have that power, the power to interpret statutory language in a Federal statute.

MR. LANDSBERG: I think that that question might depend upon whether the determinations are rational or whether they are capricious.

THE COURT: No, that is the result. The initial jurisdictional question is, do I have power. Do you acknowledge or not acknowledge that I have power to interpret the statute by declaratory judgment?

In other words, the other side has cited a number of cases. They got their lead out of Page 333 of the South Carolina v. Katzenbach case, and refer, among other things, to United States v. California Eastern Line, and Switchmen's Union, and some of the other cases which seem to say that a judge has the authority to interpret the meaning of a congressional statute which the Executive has undertaken to interpret.

MR. LANDSBERG: But those statutes did not

specifically preclude judicial review, with the sole exception, I believe, of Leedom v. Kyne. In Leedom v. Kyne --

THE COURT: Where does this statute preclude judicial review?

MR. LANDSBERG: It states that the determinations shall not be reviewable in any court in Section 4(b).

THE COURT: That isn't preclusion of judicial review, is it? That says, once the determinations are made, the Court can't quarrel with the figures.

MR. LANDSBERG: Well, Your Honor, between the figures and the methodology, or the basis for the figures, I think is a very difficult line to draw.

THE COURT: It is. But I was focusing with you on the question of whether it was the Government's position that the Court had no authority to say what the language of the statute means. I wondered if your position was the Court didn't have that authority?

MR. LANDSBERG: Well, stated that way, Your Honor, it is difficult to --

THE COURT: That is the issue, isn't it? That is the issue Texas puts to me. They say the statute means this and the Executive says it means that, and we want you to declare who is right.

MR. LANDSBERG: I think that the Congress did not intend for the determinations or the standards by which the determinations were made to be reviewed by any court. I believe that is what the statutory language means.

THE COURT: Then you would say that as long as

the interpretation is rational and consistent with the purposes of the Act, that Census has a somewhat ambulatory authority to take those terms and give them such meaning as it thinks appropriate for its determination and the Court cannot interfere.

MR. LANDSBERG: That is correct.

THE COURT: All right. But I have to look at it, don't I, to determine at least whether it is rational and consistent with the purposes of the Act?

Suppose they said: We are only going to count for this statistical determination Chinamen in Texas. So they publish figures based upon the Chinese population of Texas. You would have some difficulty with that.

MR. LANDSBERG: I think a [illegible]ition like that would be so far outside the bounds of reason --

THE COURT: So irrational.

MR.LANDSBERG: That is right.

THE COURT: I am not suggesting anybody would think of doing it but that would be so irrational a Federal Court could intervene, couldn't it?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: You see, I have made clear what is in my mind about this. I have to take what Judge Leventhal in one case said is a peek at the situation to at least assure myself that it is rational and consistent with the purposes of the statute, right?

MR. LANDSBERG: I think we welcome you taking a peek.

THE COURT: I am being quite serious about this.

MR. LANDSBERG: I understand, Your Honor. I am, too.

THE COURT: This is a very difficult problem for a Federal Court, particularly in the light of the statute language of what the scope of the Court's authority is. The Court must be deferential to the congressional purpose, will and statements but I would think that you, for the Government, would have to take the position that the Court must at least ascertain that the determination was rational and consistent with the statutory purpose.

MR. LANDSBERG: Well, Your Honor, I think the additional question arises as to when -- assuming a court could ask that question -- the court may ask it. Because as we read the purpose of the statute, it is to shift the burden, to say that once the determinations have been made, the burden shifts to the jurisdictions to demonstrate that they should not be covered, either because, as the State of South Carolina attempted to show, in South Carolina v. Katzenbach, the statute is unconstitutional. The State of South Carolina was under the Voting Rights Act for a period of seven months while the Supreme Court was considering that case.

THE COURT: Is it your view that in a bail-out proceeding the state can demonstrate that the current statistics, so to speak, are different than the findings in the publication by the Bureau of Census?

MR. LANDSBERG: Well, the issue in a bail-out proceeding is whether the use of a test or device was discriminatory, had a discriminatory purpose or effect. I think that the statistics might be relevant to showing whether there was a discriminatory purpose or effect. But I don't think there was any direct review --

THE COURT: Or to the fact that there was a device.

MR. LANDSBERG: I think in order for a device to have a discriminatory effect, there has to be a device.

THE COURT: It would be open in that hearing to challenge these figures in the sense they would say the current figures are different than the Bureau of Census has declared.

MR. LANDSBERG: The current figures would not be at issue in a bail-out suit because the issue in a bail-out suit relates to the year 1972 or relates -- the question in a bail-out suit is whether under the language of the new statute in the past seventeen years a test or device has been used with a discriminatory purpose or effect; and if at any time during that span a test or device has been so used, then the state is not entitled to bail out. That is the language of Section 4(a).

THE COURT: Even though it is not discriminating at the present time?

MR. LANDSBERG: That is right. That was one of the complaints raised by some of the Congressmen in the hearings on the latest amendments.

THE COURT: That is an issue as to constitutionality, obviously.

MR. LANDSBERG: Yes, it is, Your Honor.

THE COURT: All right. Excuse me for interrupting. You have helped me.

MR. LANDSBERG: I think it is important to emphasize that this burden shifting, this method of triggering was designed to eliminate judicial delays which the Congress found had occurred in the past, that the voting rights of citizens should be guaranteed according to the provisions of the Act while the

litigation was going on. A pendente lite kind of a concept.

That is really the extent of what I had to say about reviewability.

I would like to turn briefly to the question whether the determinations or the methods which are being used in making the determinations are proper, reasonable, whether the evidence shows that the Census Bureau is discharging its obligations correctly.

As we see it, there seem to be two types of claims made here. The first claim is that the Census Bureau is counting in as voting age citizens people who are aliens. That presents a factual issue, not a legal issue, in our view. Has it been shown they are or has it not?

Mr. Zitter's affidavit reflects that in making his determinations, the Director of the Census must necessarily start with the information provided by the Census forms, themselves.

The Census form has a space on it to show whether a person was born in this country or, as to persons not born in this country, whether the person was a naturalized citizen. There literally is no other reliable tool available to Census.

The Census Director has to then project to 1972 the results of the 1970 Census, just as under the 1965 Act and the 1970 Act the Director had to project to 1964 and 1968 from the 1960 Census. He cannot go back to 1972 and survey now what the facts were then.

The change that Congress made in the formula this time, the critical change here is the change from voting age population to voting age citizens. The Congress knew that this would necessitate the Bureau of

the Census making recourse to the questions in the 1970 Census.

I would like to point out, parenthetically, the State, itself, relies on the 1970 Census in its Bilingual Election Law, not with reference even to citizens but just to inhabitants.

The record shows that Census did subtract from the voting age population 140,000 persons who are identified as aliens. We believe on the facts the arithmetic is against the Plaintiffs. As we have computed it in our brief, I believe, in order to change the determinations that less than fifty per cent of the voting age citizens voted in the 1972 Presidential Election, the Plaintiffs would have to show that 565,000 persons of voting age counted as citizens were actually aliens. Since most aliens in Texas are of Spanish heritage, that would mean that over two-thirds of the 865,000 persons classified by Census as voting aged citizens of Spanish heritage would have to be aliens in order for Texas to prevail. We think that there is just no credible basis to suppose that two-thirds of the Mexican-Americans in Texas are illegal aliens.

As to the legal issues which are raised concerning the interpretation of the Act, we believe that they are addressed to the wrong forum. They have been considered in the Congress and the Congress has defeated amendments designed to bring about the interpretations which are sought.

Congress rejected the idea that a formal administrative hearing should precede the determinations. That was proposed by an amendment to the 1965 bill. Congress approved the reliance on estimates. Congress rejected the idea that students, military personnel, felons or citizens of unsound mind

should be excluded from the statute.

In that connection, I want to clear up what may be a little confusing in an attachment to our brief, Your Honor. Attachment 4 to our brief is Appendix L from the Senate Report on the 1965 Act and it computes the voting age population --

THE COURT: Which attachment is that, again, please?

MR. LANDSBERG: Number 4.

THE COURT: 5 is the last sheet. 4 begins --

MR. LANDSBERG: It should be a page that says, Appendix L. Page 52 of the Senate Report.

THE COURT: Yes.

MR. LANDSBERG: That table computes the voting age population by subtracting aliens and persons in military service. At that time the Senate Bill contained a provision stating that persons in military service should be subtracted. That provision was dropped from the Act as it was finally passed.

Congress clearly intended to cover states where less than fifty per cent of the voting age citizens voted. It did not allow reliance instead on what per cent of registered voters voted.

I think the quotes from the legislative history and from the case law in our briefs are compelling on that point.

Congress specifically made the definition of, test or device, retroactive, just as it had done in 1965 and 1970. Congress required the Attorney General to make his determination whether a test or device had been

used in 1972. It did not allow the Attorney General to not make a determination if it was shown that there was no discrimination. Instead the statute says that in this kind of a circumstance, the Attorney General shall consent to judgment in favor of the Plaintiff in a bail-out suit.

Now a new argument, I believe, has been raised relating to the use of the Spanish heritage figures rather than Spanish origin.

There are several different identifiers which the Census Bureau uses. In that regard I would merely refer the Court to Congressman Edward's description of how the determinations were to be made, which appears at Page H-4716 of the Daily Congressional Record.

Persons of Spanish heritage are identified as persons of Spanish language in forty-two states and the District of Columbia. Persons of Spanish language as well as persons of Spanish surname in Arizona, California, Colorado, New Mexico and Texas; and persons of Puerto Rican birth or parentage in New Jersey, New York and Pennsylvania.

Congressman Edwards was the Chairman of the House Subcommittee and the leader of the debate in the House.

Your Honor, for the above reasons, we would urge the Court to deny the interlocutory relief that has been sought and to grant our motion to dismiss or in the alternative for summary judgment.

THE COURT: Thank you.

Now, how much time would you like, sir?

MR. KOPBEL: About two minutes, Your Honor.

THE COURT: You have got five; so we are all set.

I don't mean to cut you off. I just wanted to be sure what you had in mind.

MR. KORBEL: George Korbel, representing the Defendant Intervenors Reyes, et al.

Your Honor, first of all, I would like to point out a couple of things which the Court may be interested in.

Texas relies extensively on the United States Federal Census. I checked yesterday and found at least two articles of the Texas Constitution, three articles of the Texas Election Code, and eighteen other miscellaneous statutes in Texas which rely on the Federal Census.

So it is not as if they haven't used the Census before and aren't familiar with it.

Secondly, Your Honor, we feel that what Congress was intending to do in this case was to focus on the electoral problems in the areas which they had testimony on; and I think the testimony on Texas is all over the record. It is not as if Texas was swept in as an innocent bystander here.

For example, in the thirty-eight pages in the House Committee's report, Texas or its subdivisions are mentioned forty-seven times. Judicial cases holding Texas' statutes unconstitutional or criticizing Texas' electoral methods are mentioned and cited at least twenty-three times. That is more than any other state in the Union. Texas is mentioned more than any other state of the Union and its judicial decisions are referred to more than any other state of the Union.

THE COURT: I guess it is the biggest state.

MR. KORBEL: In terms of area, we are second. In

terms of population, we are far down the list.

THE COURT: What is the biggest state, Alaska?

MR. KORBEL: Yes, I believe that is correct.

THE COURT: I keep forgetting Alaska.

MR. KORBEL: Finally, we would like to say that the nub of Texas' argument, it seems like to me, is that they will have no recourse if this Court doesn't issue the injunction.

Of course, they have the bail-out procedures. I think that is what Congress intended them to look to and we certainly expect them to look to that.

That is all I have to say, Your Honor. I would like, however, to straighten out our position in this case.

Am I to understand if Your Honor decides not to grant the Government's motion for summary judgment that then Your Honor will take under advisement our motion to intervene as parties defendant?

THE COURT: If these proceedings continue beyond today, then I think we should deal with your motion, just as we would any other motion to intervene, in normal course.

MR. KORBEL: Fine.

THE COURT: If they terminate today because of some ruling of the Court, then I am treating you as amicus and not as an intervenor.

MR. KORBEL: Fine, thank you, Your Honor.

MR. ODAM: Your Honor, if I might, I would like to yield my time for closing comments to Mr. Rhyne, co-counsel.

THE COURT: Certainly. I am glad to hear from Mr. Rhyne.

MR. RHYNE: Thank you, Your Honor.

No matter how much confusion there is in the record in this case about what all the statistics mean, there is no confusion at all about the groups that the Defendants were asked to exclude from their determination of citizens of voting age and which the Defendants have refused to exclude.

The Court can rule on whether it is proper as a matter of law to exclude those groups in construing the statute.

The Defendants here point out that in the 1975 the legislative history to specify the particular groups, military, non compos mentis, and so on, from the statutory citizens of voting age statutory term, does not preclude the exercise of this Court's duty to construe the Act in a rational way to save the Act.

The Act is not triggered, Your Honor, except on finding of a test or device; and in Section 4(d) of the Act, definitionally, it is impossible to have a test or device if there is a demonstration to the Attorney General that any test or device has been cured by subsequent remedial measure or lack of effect.

That is definitional. That is a jurisdictional fact that this Court can find and this Court should retain jurisdiction until a proper finding can be made by the Defendants on this Section 4(d) point, Your Honor. Especially where in defining the five per cent to constitute a test or device, the statistics were not determined according to lawful criteria.

The example was given, Your Honor, about the

application to forty-two states of the Spanish language definition for Spanish heritage; and the application to the State of Texas, and a very few others, of Spanish language plus Spanish surname.

That test, Your Honor, includes everyone with a Spanish surname who speaks good English in Texas. They are now found to be the persons for whom the Voting Rights Act was intended to produce Spanish ballots.

There is no rational explanation for that, Your Honor, no reason given, no matter what the Congressional record says by way of fiat that that is the way it is supposed to be.

It is true that the Voting Rights Act is designed to shift the burden to the states to defend their action. But 4(d), Your Honor, is definitional. That shifting of burden should only be done on a rational determination, according to the terms of the Act.

The application of Sections 4 and 5 of the Voting Rights Act is a tremendous burden. For example, the City of Richmond hasn't had a councilmanic election since 1970 because of a bail-out suit that is still going on. It was remanded by the Supreme Court this past term and back in this District Court before a special master, not even before the Court. That is a case where the Attorney General lined up on the side of the city. The Attorney General wanted a consent judgment.

THE COURT: What am I to draw from that?

MR. RHYNE: That there is a tremendous burden.

THE COURT: Apparently there were a great deal of problems in that lawsuit.

MR. RHYNE: That the Voting Rights Act is a tremendous burden that shouldn't lightly be invoked, Your Honor, only that. That the Defendants should make more showing than they have made in this Court to justify that burden-shifting trigger.

Your Honor, there is another way out of this that hasn't been discussed fully here. Since there is such a statistical quagmire here, there is one other part of the Act that is amenable to a fair construction in favor of the State of Texas, and that is the statutory language in the newly-amended Section 4(b) that includes the coverage of the Voting Rights Act and defines the coverage:

> Shall apply in any state or political subdivision of a state which, (1) the Attorney General determines maintained on November 1, 1972 any test or device and with respect to which (2) the Director of the Census determines that less than fifty percent of the persons of voting age were registered on November 1 of '72 or that less than fifty per cent of such persons voted in the Presidential Election of 1972.

Your Honor, I should point out that in this Committee print appended to the Defendants' brief apparently there is a typing error because it talks about, persons of voting age, and in the slip law it talks about, citizens of voting age. I think, citizens, is the proper term.

But a fair reading of that statutory language, Your Honor, is that the Defendants should determine whether fifty per cent of some group called citizens of voting age were registered, and then should consider and determine whether fifty per cent of that registered group voted.

The application of that test, Your Honor, would protect registrants, would cover the registration process, and it would cover the voting process.

THE COURT: And it would ignore the language of the statute, wouldn't it?

MR. RHYNE: I don't believe it would.

THE COURT: Doesn't it say, or?

MR. RHYNE: Or that fifty per cent of those persons voted. The words that have been twisted out of shape by Defendants and misconstrued are, such persons. I think a fair reading of the statute, Your Honor, is that such persons are the registrants and not the citizens of voting age.

Now, the figures for Texas -- and this is in the record of this case -- are that there were 7,500,000, or so, citizens of voting age, taking Defendants' figures, without making the required attempt to exclude the aliens, exclude the transients, military, and so forth. There were 5,200,000 registered, over half of the broadest and highest possible figure of citizens of voting age. And of the 5,200,000 registrants, 3,472,000 voted. They pass the fifty per cent either way, Your Honor, pass both tests, as long as this Court construes as a matter of law that the plain meaning of the statute, the plain meaning of the words, such persons, is that it refers to registrants.

I think that is a lawful way out of this statute, Your Honor, especially here where statistics cause problems that no one could have anticipated until the attempt was made to deal with the language minorities; and it is this Court's duty to construe the statute rationally and to save it; and this is a possible way.

Your Honor, if the Court please, Mr. Odam has a very brief closing comment.

THE COURT: Certainly.

MR. ODAM: Your Honor, it is just a comment, no further argument.

I simply want to again point out that we have before us today simply a very narrow but, in our judgment, a very important question that obviously applies to states other than just the Texas determination. That is, that in making the determinations referred to in Section 4, first of all, certain groups should be excluded, and that in making that determination, that the Director should make every reasonable effort to receive and accept evidence as to how many those are. And further, as Mr. Rhyne pointed out, that the Attorney General should make, in his initial determination, a determination of whether or not the test or device had a discriminatory effect and also initially determine whether or not incidents have been few in number, and so forth, as defined, as he pointed out, in Section 4(d).

I am sure I speak for the Governor and Secretary of State, that they wish to protect the voting rights of the persons of the State of Texas. We would only ask that the determinations that are to be made by these Federal agencies be rational determinations and as a matter of law they be determinations made excluding certain groups, and in excluding those groups they accept evidence as to how many persons are in those groups that should be excluded.

That is all that is before the Court today.

Thank you very much.

THE COURT: I am considering whether it would not be well for the Court to examine one or two of the matters that have been referred to again. I am going to rule orally from the bench. I have no written opinion.

I am inclined to think that the best thing to do would be to come back here at one-thirty, at which time I would give an oral ruling on these matters.

I would like to go over my notes and the comments made. You can expect that I will give you a ruling at one-thirty, if that is satisfactory to the parties.

Very well.

I do want to say I appreciate the energy and the help that both sides have given the Court in the short time available.

Having practiced law many years ago now, I know there have been some long nights and hard work. I appreciate what both sides have done.

(Whereupon at 12:05 p.m., the hearing was recessed, pursuant to reconvening at 1:30 p.m. of the same day.)

* * * * * * * * * * * * *

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on September 12,1975 and that the foregoing Pages 1 to 83, inclusive, constitute the official partial transcript.

By S/S

PROCEEDINGS

* * * * * * * * * * * *

THE COURT: Because of the time factors involved in the case we heard this morning, Dolph Briscoe, et al., v. Edward H. Levi, et al., I have decided, as I indicated to counsel, that I should present an oral ruling. I don't intend, because I am dealing with it orally, to suggest in any way that the issues are not issues of consequence.

This case was filed in this Court House on September 8, 1975 and first came to the Court's attention on an application for a temporary restraining order, at which time, following discussion in chambers, the matter was set down for the proceedings we have had this morning.

The case has come to this Court because it is acting as the Motions Judge for the month of September and Judge Corcoran, who drew the case in the random assignment, is unavailable.

Plaintiffs, the Governor and Secretary of State of the State of Texas, brought this action because of their desire to enjoin, pending reexamination by the Court, two determinations which the parties understood were about to be announced by the Bureau of Census in accordance with the Bureau's obligations under the Voting Rights Act of 1965, as amended, particularly the recent amendments relating to bilingual aspects of state and Federal elections.

It appeared to the Court that the first publication which was scheduled under Title III, the determination and publication scheduled for Tuesday of this week, should go forward and the motion for temporary restraining order as to that determination which

concerned the number of Spanish-American individuals in certain counties of Texas should be denied.

The principal area of concern, of which that first publication was just a part, is the publication in the Federal Register, I believe scheduled for Monday of next week, which the Census Bureau contemplates making dealing, under Title II, with the State of Texas as a whole.

Injunctions, either preliminarily, temporarily or permanently against the publication of that determination next Monday, are sought by the Plaintiffs. The Government Defendants have responded by motion to dismiss; and the Court having invoked Rule 12, with consent of the parties at the outset, the Government submits, in the alternative to its motion, a prayer for summary judgment.

The issues are in one respect narrow in that this is a single-judge Court and there is no question as to the constitutionality of the statute presented or indeed attempted to be presented in these proceedings.

The first determination which the Court must make as to these new amendments, however, is a determination novel in the sense that these matters -- because of the recency of the amendments, last August, I believe -- have not as yet come before any other Court and the matters presented are of first impression.

Initially the question is raised as to the Court's jurisdiction to hear the complaint and hear the parties. The statute, in pertinent part, as amended, here before me contains the following section:

"A determination or certification of the Attorney General or of the Director of the Census

under this Section or under Section 6 or Section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

The Government Defendants contend that that provision deprives the Court of any jurisdiction in the present controversy. The Court does not agree. We have here a pure legal question of the interpretation of certain provisions in this new amendment. A Federal question is raised involving the interpretation of the Act. The Court does not read the provision referred to as an absolute bar to examination by a Federal judge when a party properly concerned challenges the interpretation by the Executive of a congressional statute.

This issue in various forms has been presented in other litigation. I would cite United States v. California Eastern Line, in 348, U.S., and Switchmen's Union, in 320 U.S., as examples where the courts, barring an explicit direction not to accept jurisdiction under any circumstance, have at least to a degree felt obligated as part of their duty to make such inquiry as is necessary to ascertain whether or not the Executive, in carrying out an Act of Congress, has proceeded in accordance with congressional directive.

There is a case or controversy presented. The Secretary of State of the State of Texas and the other Plaintiff have indicated that the effect of the publication contemplated may involve expenditure of up to $10,000,000. Issues of consequence to the administration of the voting soon in prospect in Texas in connection with a constitutional referendum on November 4 certainly give the State standing and create a genuine case or controversy which the Court feels it has jurisdiction to explore, both because of the nature of the Federal question and exercising the authority

presented to the Court in the declaratory judgment statute.

This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.

The test that the Court feels must be applied in this circumstance under the narrow jurisdiction which I have indicated is here present is to determine whether or not the interpretation given by the Director of Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history.

It will not, the Court believes, serve any purpose to discuss at length a number of the questions which are presented in this regard but I do want to touch upon each of them briefly so that the Court's reasons are clear.

The first claim that is made is that the Director of Census must grant the Plaintiffs a hearing before making his determination.

There is no provision for a hearing in the statute. The possibility of requiring a hearing was considered by the Congress and declined. The Administrative Procedures Act in no way affords a hearing under these circumstances; and the Court holds that Plaintiffs are not entitled to a hearing before the Director of Census prior to his determination.

While there apparently was some failure in full communication between the parties, it should be noted that the Director of the Census has considered and been receptive to certain materials which were submitted by the Plaintiffs during the process of the determination

about to be announced.

The next question presented is really a series of questions which involve interpretation of the statute. The Court is of the view that in each instance before the Court the determination by the Director of Census is rational, consistent with the purposes and meaning of the statute and consistent with the legislative history.

The Court is of the view that there has been proper consideration given to the status of aliens in making the computations and that the Director is reasonable in relying on data derived from answers to Census questionnaires.

It seems to the Court that he has properly interpreted the phrase, "citizens of voting age," in 4(b) and has permissibly included in that figure such groups as felons, military personnel and dependents, students and mental incompetents.

The Court is of the view that the Director has properly construed the phrase, "fifty per cent of such persons," and has reasonably determined that the Voting Rights Act, as amended, is applicable, among other things, if fifty per cent of the citizens of voting age residing in the jurisdiction didn't vote in the Presidential Election of November 1972.

Those, I believe, are the principal matters.

The question of whether or not the Director can rely on 1972 data seems to the Court to go to a constitutional issue rather than anything else and has not been considered.

While there has been some discussion of a determination by the Attorney General, the Court sees nothing in the record that indicates the Attorney General at this stage has made any determination.

Now the Court has reached this conclusion in part from an overview of the statute as a whole and, of course, has been substantially persuaded by the decision of the Supreme Court in North Carolina v. Katzenbach, in 383 U.S. 301, where wholly comparable if not identical matters were considered and approved by the Court.

The statutory scheme is one that is designed to avoid judicial delay at the preliminary stages of a voting problem. It is broadly designed by Congress to create a scheme that will trigger further inquiry and shift the burden from the United States to the state whose statistics have been determined to bring the Act into play.

There are protections in the Act. The Attorney General must bring enforcement proceedings where defenses are available. There is also under certain circumstances available remedies under the so-called bail-out provisions of the statute. But the first step is a step that a court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained.

Accordingly, on the merits, the Court will grant the Defendants' motion for summary judgment and the complaint is dismissed.

I think I should, however, proceed a bit further -- in the event the Court in some fashion has erred -- and deal briefly with the question of whether or not this case presents any possible basis for preliminary relief by way of temporary restraining order or preliminary injunction.

I have already indicated why I feel there is no substantial possibility of success. It is apparent that the public interest is obviously served by protection of voting rights and not by protecting against possible expenditures by the state.

The facts as before the Court do not demonstrate any determination under the statute will change as the result of these interpretative questions. As a practical matter, the arithmetic, even if the interpretations desired by the Plaintiffs were brought into play, does not appear on the face of things at least to give any promise of changing the result triggered by the publication next Monday.

It is also to be noted in that connection that the Director of the Census has reserved the right to change his determination in some particular if he reaches the conclusion he should do so. The Department of Justice, as the legislative history intimated, has indicated a willingness to discuss interim procedures to alleviate if possible the full force of the statute against the State of Texas during the interim period between this publication and the announcement and carrying out of the vote on the 4th of November.

Under all these circumstances, I see no prospect of success and no reason to feel that preliminary relief of any kind is necessary. So that as an alternative to the dismissal of the complaint, the Court is denying any temporary restraining order or preliminary injunction as sought by the Plaintiffs here.

Now, I don't know, gentlemen, whether there is any desire on the part of the Plaintiffs to have this matter reviewed this afternoon upstairs in the Court of Appeals before the Motions Panel there. I am going to be available all afternoon. That would require some brief

order of some form which can be submitted to me and I will cooperate in any way that I can -- if there are any time factors in that regard -- to assist in that process.

The proceedings have been interesting and the Court appreciates the assistance of both sides.

If there is nothing further, that concludes these proceedings.

MR. ODAM: May I be heard, Your Honor?

Your Honor, in light of the statement by the Court that the publication is to be on next Monday --

THE COURT: That is what I understood. Is that the case?

MR. LANDSBERG: No, Your Honor.

THE COURT: I was told you were going to delay it a week; that it was due last Monday and now it was going to be this Monday, When is it going to be?

MR. LANDSBERG: A definite date has not been set. It will probably be sometime next week but not Monday.

THE COURT: Well then, I was misinformed as to that. That was why I pushed this matter along this afternoon, thinking it was going to be next Monday.

MR. ODAM: In light of that, Your Honor, if Mr. Landsberg, on behalf of the Defendants, would be willing to agree, as we did at the temporary restraining order, that the publication would not be made until at least later on in the week, say, Thursday or Friday, that would give Mr. White an opportunity to confer with Governor Briscoe back in Texas as to whether or not we want to take an appeal.

THE COURT: That would be fine. I misinterpreted the statement made in chambers that the publication would be delayed a week. I took that to mean it would not be delayed more than a week. Apparently I was wrong.

MR. ODAM: If publication would be as late as, say, next Thursday, that would give the two Plaintiffs an opportunity to decide whether or not they would want to come back and do as the Court suggested.

THE COURT: What is the defense position about that?

MR. LANDSBERG: I think probably, Your Honor, that under ordinary circumstances it would be made next Thursday, in any event.

THE COURT: All right. The Plaintiffs can be assured that it will not be made before Thursday?

MR. LANDSBERG: Yes, Your Honor.

THE COURT: Very well. That will give you time to present to me next Monday whatever order or other matters of that kind you may find necessary.

I think that is a sensible way to proceed because late Friday afternoon is not the time to take a complex matter to a busy Motions Panel. If you do decide you are going to have a review, you will have a little more time to get the matter in shape.

All right, fine. Thank you, gentlemen.
(Whereupon the hearing was concluded.)

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CONTINUED IN VOLUME III

APPENDIX

VOLUME III

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,

Petitioners

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents

On Writ of Certiorari From The United States District Court For The District Of Columbia

---

PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1976

CERTIORARI GRANTED DECEMBER 6, 1976

VOLUME III

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on September 12, 1975 and that the foregoing Pages 1 to 13, inclusive, constitute the official transcript of the Court's Ruling.

By S/S

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HON. DOLPH BRISCOE, Governor of the State of Texas, ET AL., Plaintiffs, v. HON. EDWARD H. LEVI, Attorney General of the United States, ET AL., Defendants.	Civil Action No. 75-1464

O R D E R

This matter having come before the Court for hearing on plaintiffs' request for a temporary restraining order and defendants' motion to dismiss on September 12, 1975, and it appearing to the Court and counsel that the matter could be treated as a motion for summary judgment under Rule 12 of the Federal Rules of Civil Procedure, and an application for preliminary or final injunctive relief, now therefore it is

ORDERED that for the reasons stated in open

court on September 12, 1975, after reviewing the papers and hearing oral argument and testimony, summary judgment is granted for defendants and plaintiff's application for injunctive relief is denied and the complaint dismissed.

By S/S
UNITED STATES
DISTRICT JUDGE

September 16, 1975

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Hon. DOLPH BRISCOE, Governor of the State of Texas, *et al.*, Plaintiffs	)	
V.	)	Civil Action No. 75-1464
Hon. EDWARD H. LEVI, Attorney General of the United States, *et al.*, Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, Hon. Dolph Briscoe, Governor of the State of Texas, and Mark White, Secretary of State of the State of Texas, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final Order and Judgment entered in this action on September 16, 1975.

JOHN L. HILL
ATTORNEY GENERAL
Of Texas

By S/S
LONNY F. ZWIENER
Assistant Attorney General
of Texas

ATTORNEYS FOR
PLAINTIFFS, P.O. Box 12548,
Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, Attorney for Plaintiffs, certify that a copy of the foregoing Notice of Appeal has been served on the Defendants by placing same in the United States Mail, certified, postage prepaid, addressed to the Attorney for Defendants, Mr. Brian K. Landsberg, Attorney, Department of Justice, Washington, D.C. 20500, on this ____ day of September, 1975.

By S/S
LONNY F. ZWIENER
Assistant Attorney General
of Texas

THE FOLLOWING PAPERS AND EXHIBITS WERE REPRODUCED IN THE SUPPLEMENTAL APPENDIX TO THE BRIEFS FILED IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

AFFIDAVIT

STATE OF MARYLAND

PRINCE GEORGE'S COUNTY

Meyer Zitter, being duly sworn upon oath, says:

I, Meyer Zitter, am Chief of the Population Division of the U.S. Bureau of the Census. The Population Division is responsible for the development and publication of social and demographic information needed for the formulation of public policy, for other official governmental action, and for general public needs.

I have served as Chief of the Population Division for approximately three years. Prior to this appointment I served in various capacities in the Population Division for 27 years, except for three years in the Housing Division. My field of concentration during these years has been in the area of population estimates and projections, and demographic analysis.

On August 6, 1975, the U.S. Congress passed Amendments to the 1965 Voting Rights Act, which required the U.S. Census Bureau to make certain determinations, including those political jurisidictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election.

The purpose of this affidavit is to provide a brief explanation of how those determinations were routinely made, with emphasis on how they were specifically made for the State of Texas.

Description of the Sources of Data and Computational Steps Used in Determinations under the Voting Rights Act.

1. The fundamental method used by the Census Bureau in arriving at its determinations of political jurisdictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election involves (a) updating the April 1, 1970, 18 years of age and over population figures to November 1, 1972, (b) subtracting the number of aliens of voting age, and (c) dividing the result by the total number of votes cast in the jurisdiction in the November 1972 presidential election. This computation provides the estimated precentage of "citizens of voting age who voted" and is the basis of our determination as to whether less than 50% voted. The votes cast figures used are the official tabulations provided by the state governments.

2. Using the above-described formula, the Census Bureau has determined that less than 50% of the citizens of voting age in Texas voted in the November 1972 Presidential election. The figures used in the computation were as follows:

STATE OF TEXAS:		Estimates
Voting Age Population as of 11/1/72	---	7,655,000
Aliens of Voting Age as of 11/1/72	---	140,657
Citizens of Voting Age as of 11/1/72	---	7,514,343
Votes Cast as of 11/72	---	3,472,714
Percent Citizens of Voting Age Voting	---	46.2%

3. The sources of the data used in the above computations are set forth below:

a. The April 1, 1970, population figures are derived by tabulation of data contained in the U.S. Census

Questionnaire (Exhibit 1). Questions 5-7 are 100 percent items which record the age of every person in the household.

b. Estimates for November 1, 1972, population are made by interpolating between estimates for July 1, 1972 and July 1, 1973. The latter estimates are derived by averaging the results of two statistical methods which use current data to estimate change in the total population since April 1970. These methods are explained in detail on pages 7-17 of the Census Bureau's Current Population Reports, "Population Estimates and Projections," Series P-25, No. 520, July 1974 (Exhibit 2).

The Texas estimates were based on interpolation of July 1, 1972 and July 1, 1973 population estimates set forth in Table 3 or Exhibit 2.

Estimates of the November 1, 1972, population under 18 years of age for Texas are computed in a manner consistent with the estimate of total population and then subtracted from the total population estimates to obtain the voting age population estimates.

c. For the present purpose, the alien population was derived for the 1970 census by combining the results of responses to Questions 13a and 16a in the 5 percent sample forms of the April 1970 Census questionnaire (see Exhibit 1).

In response to Congressional interagency the availability of "citizens of voting age" data for Voting Rights Act Amendment purposes, members of my staff prepared three letters to Congressman Herman Badillo (May 21, 1975), Congressman Stephen J. Solarz (May 23, 1975) and Senator John V. Tunney (June 12, 1974), regarding the alien population issues. These letters are attached as Exhibits 3,4, and 5, respectively.

d. The official number of votes cast in each county and the State of Texas was provided by the State of Texas.

4. The figure, "citizens of voting age population," is derived by subtracting the aliens of voting age from the total persons of voting age. In the Census, persons are enumerated at their "usual residence," i.e., the place in which they generally eat, sleep and work, with persons who are temporarily absent for days or weeks from such usual place of abode being counted as residents of their usual place of abode. The "citizens of voting age" category include college students, persons serving in the armed forces in the relevant jurisdiction, lunatics, or convicted felons. Our determinations are based on a count of all citizens without regard to possible voter disqualification factors.

Communications between the Census Bureau and the State of Texas

1. I have read the correspondence between Mr. Vincent Barabba, Director of the U.S. Bureau of the Census, and Mr. Mark White, Secretary of the State of Texas, which is attached to Mr. White's affidavit of September 8, 1975, submitted to this court, and confirm their authenticity.

2. Pursuant to instructions from the U.S. Department of Justice (See Exhibit F of Mr. Mark White's affidavit of September 8, 1975) the Population Division of the Census Bureau began to make its initial determinations of jurisdictions covered under the 1975 Amendments to the Voting Rights Act. After these initial determinations were made, the Director of the Census Bureau notified the various jurisdictions, including the State of Texas, of the results by telegram of August 27, 1975. (See Exhibit D of Mr. Mark White's

affidavit of September 8, 1975.) In addition, on September 4, 1975, the Census Bureau issued a press release listing the 5 states, 224 counties and one city which appear to fall under coverage of one or more of the 1975 Amendments. (Exhibit 6).

A final determination as to coverage of the State of Texas under Title II of the 1975 Amendments has not yet been published in the Federal Register.

3. I was present at the September 5, 1975, meeting arranged by Director Barabba, at the request of Mr. White, to provide Mr. White with the opportunity to submit additional information he believed pertinent to our determination and to see if he had any facts which would suggest that our initial determination, regarding coverage of the State of Texas under Title II of the 1975 Amendments to the Voting Rights Act, was incorrect.

Other participants at that meeting were staff members from the Census Bureau and the U.S. Department of Justice.

During the meeting, I explained the methodology reviewed above in this affidavit and the basis for our initial determination that less than 50 percent of citizens of voting age had voted in the 1972 Presidential election in the State of Texas. Mr. White presented no facts which would change our initial determination as to Texas.

By S/S
MEYER ZITTER

STATE OF MARYLAND

PRINCE GEORGE COUNTY.

I, Irene C. Stewart, a Notary Public, do hereby certify

that on this 11th day of September 1975, personally appeared before me Meyer Zitter, who duly sworn, declared that he is Chief of the Population Division of the U.S. Census Bureau, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

By S/S

Notary Public in and for
Prince George's County,
State of Maryland

My commission expires:

EXHIBITS ATTACHED TO AFFIDAVIT OF MEYER ZITTER

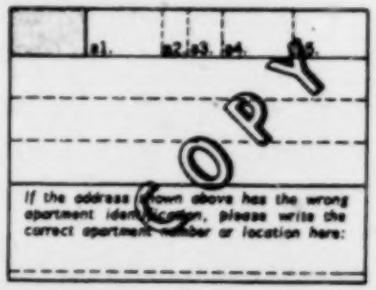
[redacted]

EXHIBIT 1

UNITED STATES CENSUS

This is your Official Census Form

Please fill it out and mail it back on Census Day, Wednesday, April 1, 1970



How To Fill This Form

1. **Use a black pencil to answer the questions.**

   This form is read by an electronic computer. Black pencil is better to use than ballpoint or other pens.

   Fill circles "○" like this: ●

   The electronic computer reads every circle you fill. If you fill the wrong circle, erase or mark completely, then fill the right circle.

   When you write an answer, print and write clearly.

2. **See the filled-in example on the yellow instruction sheet.**

   This example shows how to fill circles and write in answers. If you are not sure of an answer, give the best answer you can.

   If you have a problem, look in the instruction sheet.

   The instructions are numbered the same as the questions on the Census form.

   If you need more help, call the Census office.

   You can get the number of the local office from telephone "Information" or "Directory assistance."

3. **Your answers are CONFIDENTIAL. The law (Title 13, United States Code) requires that you answer the questions to the best of your knowledge.**

   Your answers will be used only for statistical purposes and cannot, by law, be disclosed to any person outside the Census Bureau for any reason whatsoever.

   The householder should make sure that the information is shown for everyone here.

   If a boarder or roomer or anyone else prefers not to give the householder all his information to enter on the form, the householder should give at least his name, relationship, and sex in questions 1 to 3, then mail back the form. A Census Taker will call to get the rest of the information directly from the person.

4. **Check your answers. Then, mail back this form on Wednesday, April 1, or as soon afterward as you can. Use the enclosed envelope; no stamp is needed.**

   Your cooperation in carefully filling out the form and mailing it back will help make the census successful. It will save the government the expense of calling on you for the information.

PLEASE CONTINUE

U.S. Department of Commerce
Bureau of the Census
Form D-36

5. **Answer the questions in this order:**

   Questions on page 2 about the people in your household.

   Questions on page 3 about your house or apartment.

6. **In Question 1 on page 2, please list each person who was living here on Wednesday, April 1, 1970, or who was staying or visiting here and had no other home.**

EXPLANATORY NOTES

This leaflet shows the content of the 1970 census questionnaires. The content was determined after review of the 1960 census experience, extensive consultation with many government and private users of census data, and a series of experimental censuses in which various alternatives were tested.

Three questionnaires are being used in the census and each household has an equal chance of answering a particular form.

80 percent of the households answer a form containing only the questions on pages 2 and 3 of this leaflet.

15 percent and **5 percent** of the households answer forms which also contain the specified questions on the remaining pages of this leaflet. The 15-percent form does not show the 5-percent questions, and the 5-percent form does not show the 15-percent questions. On both forms, population questions 13 to 41 are repeated for each person in the household but questions 24 to 41 do not apply to children under 14 years of age.

The same sets of questions are used throughout the country, regardless of whether the census in a particular area is conducted by mail or house-to-house canvass. An illustrative example is enclosed with each questionnaire to help the householder complete the form.

80, 15, and 5 percent (100 percent)

Page 2

DO NOT MARK THIS COLUMN	1. WHAT IS THE NAME OF EACH PERSON who was living here on Wednesday, April 1, 1970 or who was staying or visiting here and had no other home?	2. HOW IS EACH PERSON RELATED TO THE HEAD OF THIS HOUSEHOLD?
	Print names in this order: *Head of the household; Wife of head; Unmarried children, oldest first; Married children and their families; Other relatives of the head; Persons not related to the head*	*Fill one circle.* *If "Other relative of head," also give exact relationship, for example mother-in-law, brother, niece, grandson, etc.* *If "Other not related to head," also give exact relationship, for example partner, maid, etc.*
	(1) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(2) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(3) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(4) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(5) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(6) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(7) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship
	(8) Last name / First name / Middle initial	○ Head of household ○ Wife of head ○ Son or daughter of head ○ Other relative of head—Print exact relationship → ○ Roomer, boarder, lodger ○ Patient or inmate ○ Other not related to head—Print exact relationship

9. *If you used all 8 lines*—Are there any other persons in this household? ○ Yes ○ No — *Do not list the others; we will call to get the information.*

10. Did you leave anyone out of Question 1 because you were not sure if he should be listed—for example, a new baby still in the hospital, or a lodger who also has another home? ○ Yes ○ No — *On back page, give name(s) and reason left out.*

80, 15, and 5 percent (100 percent)

3. SEX	4. COLOR OR RACE	DATE OF BIRTH: 5. Month and year of birth and age last birthday	6. Month of birth	7. Year of birth	8. WHAT IS EACH PERSON'S MARITAL STATUS?
Fill one circle	*Fill one circle. If "Indian (American)," also give tribe. If "Other," also give race.*	*Print*	*Fill one circle*	*Fill one circle for first three numbers / Fill one circle for last number*	*Fill one circle*
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married
○ Male ○ Female	○ White ○ Negro or Black ○ Indian (Amer.) Print tribe → ○ Japanese ○ Chinese ○ Filipino ○ Hawaiian ○ Korean ○ Other—Print race	Month / Year / Age	○ Jan.-Mar. ○ Apr.-June ○ July-Sept. ○ Oct.-Dec.	○ 186- ○ 187- ○ 188- ○ 189- ○ 190- ○ 191- ○ 192- ○ 193- ○ 194- ○ 195- ○ 196- ○ 197- / ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9	○ Now married ○ Widowed ○ Divorced ○ Separated ○ Never married

Make no mark in the margin

11. Did you list anyone in Question 1 who is away from home now—for example, on a vacation or in a hospital? ○ Yes ○ No — *On back page, give name(s) and reason person is away.*

12. Did anyone stay here on Tuesday, March 31, who is not already listed? ○ Yes ○ No — *On back page, give name of each visitor for whom there is no one at his home address to report him to a census taker.*

26:1

Please answer questions 10, 11, and 12 at the bottom of page 3

80, 15, and 5 percent (100 percent)

Page 3

A. How many living quarters, occupied and vacant, are at this address?
- One
- 2 apartments or living quarters
- 3 apartments or living quarters
- 4 apartments or living quarters
- 5 apartments or living quarters
- 6 apartments or living quarters
- 7 apartments or living quarters
- 8 apartments or living quarters
- 9 apartments or living quarters
- 10 or more apartments or living quarters
- This is a mobile home or trailer

Answer these questions for your living quarters

H1. Is there a telephone on which people in your living quarters can be called?
- Yes → What is the number?
- No

Phone number

H2. Do you enter your living quarters—
- Directly from the outside or through a common or public hall?
- Through someone else's living quarters?

H3. Do you have complete kitchen facilities?
Complete kitchen facilities are a sink with piped water, a range or cook stove, and a refrigerator
- Yes, for this household only
- Yes, but also used by another household
- No complete kitchen facilities for this household

H4. How many rooms do you have in your living quarters?
Do not count bathrooms, porches, balconies, foyers, halls, or half rooms
- 1 room
- 2 rooms
- 3 rooms
- 4 rooms
- 5 rooms
- 6 rooms
- 7 rooms
- 8 rooms
- 9 rooms or more

H5. Is there hot and cold piped water in this building?
- Yes, hot and cold piped water in this building
- No, only cold piped water in this building
- No piped water in this building

H6. Do you have a flush toilet?
- Yes, for this household only
- Yes, but also used by another household
- No flush toilet

H7. Do you have a bathtub or shower?
- Yes, for this household only
- Yes, but also used by another household
- No bathtub or shower

H8. Is there a basement in this building?
- Yes
- No, built on a concrete slab
- No, built in another way *(Includes mobile homes and trailers)*

H9. Are your living quarters—
- Owned or being bought by you or by someone else in this household? *Do not include cooperatives and condominiums here*
- A cooperative or condominium which is owned or being bought by you or by someone else in this household?
- Rented for cash rent?
- Occupied without payment of cash rent?

H10a. Is this building a one-family house?
- Yes, a one-family house
- No, a building for 2 or more families or a mobile home or trailer

b. *If "Yes"* — Is this house on a place of 10 acres or more, or is any part of this property used as a commercial establishment or medical office?
- Yes, 10 acres or more
- Yes, commercial establishment or medical office
- No, none of the above

H11. *If you live in a one-family house which you own or are buying*
What is the value of this property; that is, how much do you think this property (house and lot) would sell for if it were for sale?

- Less than $5,000
- $5,000 to $7,499
- $7,500 to $9,999
- $10,000 to $12,499
- $12,500 to $14,999
- $15,000 $17,499
- $17,500 to $19,999
- $20,000 to $24,999
- $25,000 to $34,999
- $35,000 to $49,999
- $50,000 or more

If the house is on a place of 10 acres or more, or if any part of the property is used as a commercial establishment or medical office, do not answer the question.

H12. *Answer the question if you pay rent for your living quarters*
a. *If rent is paid by the month*—
What is the monthly rent?

If rent answer here → $ _____ .00 *(Nearest dollar)*

and

Fill one circle

- Less than $30
- $30 to $39
- $40 to $49
- $50 to $59
- $60 to $69
- $70 to $79
- $80 to $89
- $90 to $99
- $100 to $119
- $120 to $149
- $150 to $199
- $200 to $249
- $250 to $299
- $300 or more

b. *If rent is not paid by the month*—
What is the rent, and what period of time does it cover?

$ _____ .00 per _____
(Nearest dollar) *(Week, half month, year, etc.)*

FOR CENSUS ENUMERATOR'S USE ONLY

H1. Block number | **H2.** Serial number

H3. Type of unit or quarters
- Occupied
  - First form
  - Continuation
- Vacant
  - Regular
  - Usual residence elsewhere
- Group quarters
  - First form
  - Continuation

For a vacant unit, also fill C, D, A, H2 to H9, and H10 to H12

H4. Vacancy status
Type, check—
- For rent
- For sale only
- Rented or sold, not occupied
- Held for occasional use
- Other vacant
- Boarded
- Mortgaged

H5. Months vacant
- Less than 1 month
- 1 up to 2 months
- 2 up to 6 months
- 6 up to 12 months
- 1 year up to 2 years
- 2 years or more

C/O

Page 4

H13. *Answer question H13 if you pay rent for your living quarters*
In addition to the rent entered in H12, do you also pay for—

a. Electricity?
- Yes, average monthly cost is → $ _____ .00 *Average monthly cost*
- No, included in rent
- No, electricity not used

b. Gas?
- Yes, average monthly cost is → $ _____ .00 *Average monthly cost*
- No, included in rent
- No, gas not used

c. Water?
- Yes, yearly cost is → $ _____ .00 *Yearly cost*
- No, included in rent or no charge

d. Oil, coal, kerosene, wood, etc.?
- Yes, yearly cost is → $ _____ .00 *Yearly cost*
- No, included in rent
- No, these fuels not used

H14. How are your living quarters heated?
Fill one circle for the kind of heat you use most
- Steam or hot water system
- Central warm-air furnace with ducts to the individual rooms, or central heat pump
- Built-in electric units *(permanently installed in wall, ceiling or baseboard)*
- Floor, wall, or pipeless furnace
- Room heaters with flue or vent, burning gas, oil, or kerosene
- Room heaters without flue or vent, burning gas, oil, or kerosene *(not portable)*
- Fireplaces, stoves, or portable room heaters of any kind
- In some other way—*Describe* →
- None, unit has no heating equipment

H15. About when was this building originally built? *Mark when the building was first constructed, not when it was remodeled, added to, or converted*
- 1969 or 1970
- 1965 to 1968
- 1960 to 1964
- 1950 to 1959
- 1940 to 1949
- 1939 or earlier

H16. Which best describes this building?
Include all apartments, flats, etc., even if vacant
- A one-family house detached from any other house
- A one-family house attached to one or more houses
- A building for 2 families
- A building for 3 or 4 families
- A building for 5 to 9 families
- A building for 10 to 19 families
- A building for 20 to 49 families
- A building for 50 or more families
- A mobile home or trailer
- Other—*Describe*

H17. Is this building—
- On a city or suburban lot? — *Skip to H19*
- On a place of less than 10 acres?
- On a place of 10 acres or more?

H18. Last year, 1969, did sales of crops, livestock, and other farm products from this place amount to—
- Less than $50 (or None)
- $50 to $249
- $250 to $2,499
- $2,500 to $4,999
- $5,000 to $9,999
- $10,000 or more

H19. Do you get water from—
- A public system *(city water department, etc.)* or private company?
- An individual well?
- Some other source *(a spring, creek, river, cistern, etc.)*?

H20. Is this building connected to a public sewer?
- Yes, connected to public sewer
- No, connected to septic tank or cesspool
- No, use other means

H21. How many bathrooms do you have?
A complete bathroom is a room with flush toilet, bathtub or shower, and with hot and cold piped water
A half bathroom has at least a flush toilet or bathtub or shower, but does not have all the facilities for a complete bathroom
- No bathroom, or only a half bathroom
- 1 complete bathroom
- 1 complete bathroom, plus half bath(s)
- 2 complete bathrooms
- 2 complete bathrooms, plus half bath(s)
- 3 or more complete bathrooms

H22. Do you have air-conditioning?
- Yes, 1 individual room unit
- Yes, 2 or more individual room units
- Yes, a central air-conditioning system
- No

H23. How many passenger automobiles are owned or regularly used by members of your household?
Count company cars kept at home
- None
- 1 automobile
- 2 automobiles
- 3 automobiles or more

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The 15-percent form contains the questions shown on page 4. The 5-percent form contains the questions shown in the first column of page 4 and the questions on page 5.

Page 5

H24a. How many stories (floors) are in this building?

1 to 3 stories
4 to 6 stories
7 to 12 stories
13 stories or more

b. If 4 or more stories—
Is there a passenger elevator in this building?

Yes No

H25a. Which fuel is used most for cooking?

Gas: From underground pipes serving the neighborhood	Coal or coke
Gas: Bottled, tank, or LP	Wood
Electricity	Other fuel
Fuel oil, kerosene, etc.	No fuel used

b. Which fuel is used most for house heating?

Gas: From underground pipes serving the neighborhood	Coal or coke
Gas: Bottled, tank, or LP	Wood
Electricity	Other fuel
Fuel oil, kerosene, etc.	No fuel used

c. Which fuel is used most for water heating?

Gas: From underground pipes serving the neighborhood	Coal or coke
Gas: Bottled, tank, or LP	Wood
Electricity	Other fuel
Fuel oil, kerosene, etc.	No fuel used

H26. How many bedrooms do you have?
Count rooms used mainly for sleeping even if used also for other purposes

No bedroom	3 bedrooms
1 bedroom	4 bedrooms
2 bedrooms	5 bedrooms or more

H27a. Do you have a clothes washing machine?

Yes, automatic or semi-automatic
Yes, wringer or separate spinner
No

b. Do you have a clothes dryer?

Yes, electrically heated
Yes, gas heated
No

c. Do you have a dishwasher *(built-in or portable)*?

Yes No

d. Do you have a home food freezer which is separate from your refrigerator?

Yes No

H28a. Do you have a television set? *Count only sets in working order*

Yes, one set
Yes, two or more sets
No

b. *If "Yes"*— **Is any set equipped to receive UHF broadcasts, that is, channels 14 to 83?**

○ Yes ○ No

H29. Do you have a battery-operated radio?
Count car radios, transistors, and other battery-operated sets in working order or needing only a new battery for operation.

Yes, one or more ○ No

H30. Do you (or any member of your household) own a second home or other living quarters which you occupy sometime during the year?

○ Yes ○ No

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The 15-percent and 5-percent forms contain a pair of facing pages for each person in the household as listed on page 2. Shown on each pair of pages in the 15-percent form are the questions designated as 15-percent here on pages 6, 7, and 8. Shown on each pair of pages in the 5-percent form are the questions designated as 5-percent here on pages 6, 7, and 8.

Name of person on line ① of page 2

Last name First name Initial

13a. Where was this person born? *If born in hospital, give State or country where mother lived. If born outside U.S., see instruction sheet; distinguish Northern Ireland from Ireland (Eire).*

○ This State
OR
(Name of State or foreign country; or Puerto Rico, Guam, etc.)

b. Is this person's origin or descent— *(Fill one circle)*

○ Mexican	○ Central or South American
○ Puerto Rican	○ Other Spanish
○ Cuban	○ No, none of these

14. What country was his father born in?

○ United States
OR
(Name of foreign country; or Puerto Rico, Guam, etc.)

15. What country was his mother born in?

○ United States
OR
(Name of foreign country; or Puerto Rico, Guam, etc.)

16. *For persons born in a foreign country—*
a. Is this person naturalized?

○ Yes, naturalized
○ No, alien
○ Born abroad of American parents

b. When did he come to the United States to stay?

○ 1965 to 70	○ 1950 to 54	○ 1925 to 34
○ 1960 to 64	○ 1945 to 49	○ 1915 to 24
○ 1955 to 59	○ 1935 to 44	○ Before 1915

17. What language, other than English, was spoken in this person's home when he was a child? *Fill one circle*

○ Spanish	○ Other— *Specify*
○ French	
○ German	○ None, English only

18. When did this person move into this house (or apartment)?
Fill circle for date of last move

○ 1969 or 70	○ 1965 or 66	○ 1949 or earlier
○ 1968	○ 1960 to 64	○ Always lived in this house or apartment
○ 1967	○ 1950 to 59	

19a. Did he live in this house on April 1, 1965? *If in college or Armed Forces in April 1965, report place of residence there.*

○ Born April 1965 or later } *Skip to 20*
○ Yes, this house }
○ No, different house

b. Where did he live on April 1, 1965?

(1) State, foreign country, U.S. possession, etc.

(2) County

(3) Inside the limits of a city, town, village, etc.?

○ Yes ○ No

(4) *If "Yes,"* name of city, town, village, etc.

20. Since February 1, 1970, has this person attended regular school or college at any time? *Count nursery school, kindergarten, and schooling which leads to an elementary school certificate, high school diploma, or college degree*

○ No
○ Yes, public
○ Yes, parochial
○ Yes, other private

21. What is the highest grade (or year) of regular school he has ever attended?
Fill one circle. If now attending, mark grade he is in.

○ Never attended school— *Skip to 23*
○ Nursery school
○ Kindergarten

Elementary through high school (grade or year)

1	2	3	4	5	6	7	8	9	10	11	12
○	○	○	○	○	○	○	○	○	○	○	○

College (academic year)

1	2	3	4	5	6 or more
○	○	○	○	○	○

22. Did he finish the highest grade (or year) he attended?

○ Now attending this grade (or year)
○ Finished this grade (or year)
○ Did not finish this grade (or year)

23. When was this person born?

○ Born before April 1956— *Please go on with questions 24 through 41.*

○ Born April 1956 or later— *Please omit questions 24 through 41 and go to the next page for the next person.*

24. *If this person has ever been married—*
a. Has this person been married more than once?

○ Once ○ More than once

b. When did he get married? | **When did he get married for the first time?**

Month Year | *Month Year*

c. *If married more than once—* **Did the first marriage end because of the death of the husband (or wife)?**

○ Yes ○ No

25. *If this is a girl or a woman—*
How many babies has she ever had, not counting stillbirths?
Do not count her stepchildren or children she has adopted.

1	2	3	4	5	6	7	8
○	○	○	○	○	○	○	○

9	10	11	12 or more	None
○	○	○	○	○

26. *If this is a man—*
a. Has he ever served in the Army, Navy, or other Armed Forces of the United States?

○ Yes
○ No

b. Was it during— *(Fill the circle for each period of service.)*

Vietnam Conflict *(Since Aug. '64)* ○
Korean War *(June 1950 to Jan. 1955)* ○
World War II *(Sept. 1940 to July 1947)* ○
World War I *(April 1917 to Nov. 1918)* ○
Any other time ○

27b. Has this person ever completed a vocational training program? *For example: in high school; as apprentice; in school of business, nursing, or trades; technical institute; or Armed Forces school.*

Yes — No — Skip to 28

b. What was his main field of vocational training? *Fill one circle.*

- Business, office work
- Nursing, other health fields
- Trades and crafts (*machinist, electrician, lineman, etc.*)
- Engineering or science technician, draftsman
- Agriculture or home economics
- Other field— *Specify* →

28a. Does this person have a health or physical condition which limits the *kind* or *amount* of work he can do at a job? *If 65 years old or over, skip to question 29.*

- Yes
- No

b. Does his health or physical condition keep him from holding *any* job at all?

- Yes
- No

c. *If "Yes" to a or b—* How long has he been limited in his ability to work?

- Less than 6 months
- 6 to 11 months
- 1 to 2 years
- 3 to 4 years
- 5 to 9 years
- 10 years or more

QUESTIONS 29 THROUGH 41 ARE FOR ALL PERSONS BORN BEFORE APRIL 1956, INCLUDING HOUSEWIVES, STUDENTS, OR DISABLED PERSONS AS WELL AS PART TIME OR FULL TIME WORKERS

29a. Did this person work at any time *last week*?

- Yes— *Fill the circle if the person did full- or part-time work. (Count part-time work such as a lawnmowing job, delivering papers, or helping without pay in a family business or farm, and active duty in the Armed Forces.)*
- No— *Fill the circle if the person did not work, or did only own housework, school work, or volunteer work.*

→ Skip to 30

b. How many hours did he work *last week* (at all jobs)? *Subtract any time off and add overtime or extra hours worked.*

- 1 to 14 hours
- 15 to 29 hours
- 30 to 34 hours
- 35 to 39 hours
- 40 hours
- 41 to 48 hours
- 49 to 59 hours
- 60 hours or more

c. Where did he work *last week*?

If he worked in more than one place, print where he worked most last week.

If he usually does not go to work or if the place does not have a numbered address, see instruction sheet.

(1) Address (*Number and street name*)

(2) Name of city, town, village, etc.

(3) Inside the limits of this city, town, village, etc.?

- Yes
- No

(4) City

(5) State

(6) ZIP Code

d. How did he get to work *last week*? *Fill one circle for chief means used on the last day he worked at the address given in 29c.*

- Driver, private auto
- Passenger, private auto
- Bus or streetcar
- Subway or elevated
- Railroad
- Taxicab
- Motorcycle
- Worked at home
- Other means— *Specify* →

After completing question 29d, skip to question 31.

30. Does this person have a job or business from which he was temporarily absent or on layoff *last week*?

- Yes, on layoff
- Yes, on vacation, temporary illness, labor dispute, etc.
- No

31a. Has he been looking for work during the past 4 weeks?

- Yes
- No— Skip to 32

b. Was there any reason why he could not take a job *last week*?

- Yes, already has a job
- Yes, because of this person's temporary illness
- Yes, for other reasons (*in school, etc.*)
- No, could have taken a job

32. When did he last work at all, even for a few days?

- In 1970
- In 1969
- In 1968
- 1964 to 1967
- 1960 to 1963
- 1959 or earlier
- Never worked

→ Skip to 33

5 percent

15 percent

15 and 5 percent

15 and 5 percent

– continued –

33–35. Current or most recent job activity

Describe clearly this person's chief job activity or business last week, if any. If he had more than one job, describe the one at which he worked the most hours.

If this person had no job or business last week, give information for last job or business since 1960.

33. Industry

a. For whom did he work? *If now on active duty in the Armed Forces, print "AF" and skip to question 36.*

(*Name of company, business, organization, or other employer*)

b. What kind of business or industry was this?
Describe activity at location where employed.

(*For example: junior high school, retail supermarket, dairy farm, TV and radio service, auto assembly plant, road construction*)

c. Is this mainly— *(Fill one circle)*

- Manufacturing
- Wholesale trade
- Retail trade
- Other (*agriculture, construction, service, government, etc.*)

34. Occupation

a. What kind of work was he doing?

(*For example: TV repairman, sewing machine operator, typist, cost engineer, farm operator, farm hand, junior high English teacher*)

b. What were his most important activities or duties?

(*For example: Types, keeps accounts books, files, sells cars, operates printing press, cleans buildings, teaches courses*)

c. What was his job titled?

35. Was this person— *(Fill one circle)*

- Employee of private company, business, or individual, for wages, salary, or commission
- Federal government employee
- State government employee
- Local government employee (*city, county, etc.*)
- Self-employed in own business, professional practice, or farm—
  - Own business not incorporated
  - Own business incorporated
- Working without pay in family business or farm

36. In April 1970, what State did this person live in?

- This State

OR

(*Name of State or foreign country, or Puerto Rico, etc.*)

37. In April 1970, was this person— *(Fill three circles)*

a. Waiting at a job or business (*full- or part-time*)?
- Yes
- No

b. In the Armed Forces?
- Yes
- No

c. Attending college?
- Yes
- No

38. *If "Yes" for "Working at a job or business" in question 37—* Describe this person's chief activity or business in April 1970.

a. What kind of business or industry was this?

b. What kind of work was he doing (*occupation*)?

c. Was he—
- An employee of a private company or government agency
- Self-employed or an unpaid family worker

39a. Last year (1969), did this person work at all, even for a few days?

- Yes
- No— Skip to 41

b. How many weeks did he work in 1969, either full-time or part-time? *Count paid vacation, paid sick leave, and military service.*

- 13 weeks or less
- 14 to 26 weeks
- 27 to 39 weeks
- 40 to 47 weeks
- 48 to 49 weeks
- 50 to 52 weeks

40. Earnings in 1969— *Fill parts a, b, and c for everyone who worked any time in 1969 even if he had no income. (If exact amount is not known, give best estimate.)*

a. How much did this person earn in 1969 in wages, salary, commissions, bonuses, or tips from all jobs? *(Before deductions for taxes, bonds, dues, or other items)*

$ .00 (*Dollars only*)
OR
- None

b. How much did he earn in 1969 from his own nonfarm business, professional practice, or partnership? *(Net after business expenses. If business lost money, write "Loss" above amount.)*

$ .00 (*Dollars only*)
OR
- None

c. How much did he earn in 1969 from his own farm? *(Net after operating expenses. Include earnings as a tenant farmer or sharecropper. If farm lost money, write "Loss" above amount.)*

$ .00 (*Dollars only*)
OR
- None

41. Income other than earnings in 1969— *Fill parts a, b, and c. (If exact amount is not known, give best estimate.)*

a. How much did this person receive in 1969 from Social Security or Railroad Retirement?

$ .00 (*Dollars only*)
OR
- None

b. How much did he receive in 1969 from public assistance or welfare payments? *Include aid for dependent children, old age assistance, general assistance, aid to the blind or totally disabled. Exclude vendor payments for hospital or other medical care.*

$ .00 (*Dollars only*)
OR
- None

c. How much did he receive in 1969 from all other sources? *Include interest, dividends, veterans' payments, pensions, and other regular payments. (See instruction sheet)*

$ .00 (*Dollars only*)
OR
- None

15 percent

15 percent

GPO : 1971 O - 417-433

CURRENT POPULATION REPORTS

EXHIBIT 2

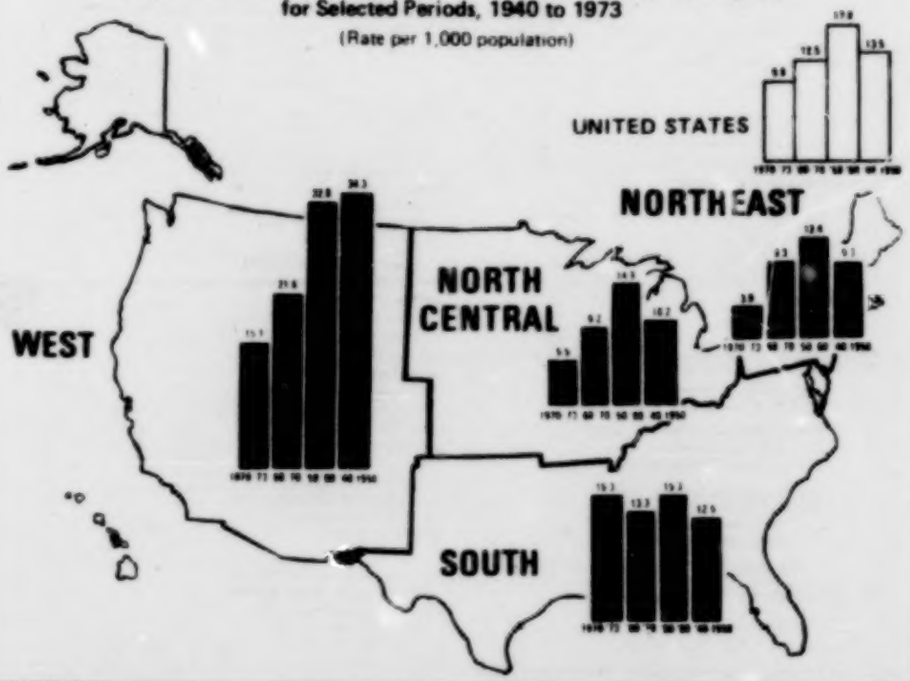
Population Estimates and Projections

Series P-25 No. 520
Issued July, 1974

ESTIMATES OF THE POPULATION OF STATES WITH COMPONENTS OF CHANGE, 1970 TO 1973

Figure 1. Average Annual Rates of Population Growth by Regions for Selected Periods, 1940 to 1973

(Rate per 1,000 population)



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ACKNOWLEDGMENTS

This report was prepared by David L. Word, under the direction of Donald E. Starsinic, Chief, State and Local Population Estimates and Projection Branch. Statistical assistance was provided by Prudence H. Thomas, Salome W. Chappelle, E. Jean Bradley and Marianne T. Roberts. Computer applications were directed by Jerome M. Glynn. Jacob S. Siegel, Staff Assistant, was responsible for a detailed review of the methodology section of the text and made major contributions in the writing of this section of the report.

SUGGESTED CITATION

U.S. Bureau of the Census, Current Population Reports, P-25, No. 520, "Estimates of the Population of States With Components of Change, 1970 to 1973," U.S. Government Printing Office, Washington, D.C. 1974.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402, and U.S. Department of Commerce, district offices, 75 cents. Current Population Reports issued in Series P-20, P-23, P-25, P-26, P-27, P-28 (summaries only), P-60, and P-65 are sold as a single consolidated subscription at $30.50 per year, $7.75 additional for foreign mailing.

CONTENTS

ESTIMATES OF THE POPULATION OF STATES WITH COMPONENTS OF CHANGE, 1970 TO 1973

(The population estimates for 1972 and 1973 were previously published in Advance Report No. 508. The numbers here supersede those published in Series P-25, Nos. 488 and 488)

INTRODUCTION

This report contains revised estimates of the population of States for July 1, 1970 through 1972 and provisional population estimates for July 1, 1973 together with provisional components of population change for the period April 1, 1970 to July 1, 1973. Data are summarized for both census regions and divisions and for standard federal regions. Annual rates of population growth by component are presented for 1970 to 1973 and for three previous periods--1940-50, 1950-60, and 1960-70.

A description of the methodology used in developing these estimates is included, together with discussion of the limitation of the estimates and an evaluation of the accuracy of the procedure for the 1960's. As a result of testing the estimating procedures against the 1970 census, they have undergone substantial changes. (See section on Methodology).

GENERAL GROWTH TRENDS

A decided change in patterns of State population growth has occurred since the last decennial census of population, as indicated by the estimates in this report. The first three years of the 1970's have been a period of very slow population growth for the United States as a whole. The principal contributor to this slowdown has been another sharp drop in the birth rate, augmenting the decline experienced in the 1960's. Current birth rates in the United States are the lowest in our history, below those of the Depression. All States are experiencing this declining birth rate, with California and New York having the largest declines.

Concurrently there has been a sharp change in the pattern of net interstate migration from that of the past several decades. The South, even excluding Florida, is attracting net in-migration while the Northern industrial States are experiencing moderately heavy net out-migration. Southern California has been experiencing an economic downturn. This has resulted in a significant slowing of population growth in the State due to net migration. Somewhat blurring the migration patterns between 1970 and 1972, was the net return to civilian life of one million persons who were serving in the Armed Forces, one-half from Vietnam, but this was no longer a factor after 1972.

The net effect of these changes are mixed. The large industrial States had downward trends in both births and migration, whereas many of the smaller and more rural States grew more rapidly because increased net migration more than offset a decline in births. The major resort States, Florida, Arizona, Nevada, and Colorado, where net migration rather than natural increase is the more important source of growth, have maintained rapid growth rates.

Since 1970, Florida has surpassed California as the State with the largest population increase. In the 3-1/4 year period between the April 1, 1970 census and July 1, 1973, Florida's population is estimated to have increased by nearly 900,000 or 13.1 percent (table A). Over the same time period, California, with three times the population, added 650,000 people, but its rate of growth was slightly less than the United States average of 3.3 percent.

Texas, with a population increase of 600,000 (5.3 percent), was the only other State adding more than 300,000. No State is estimated to have decreased in population between 1970 and 1973. The District of Columbia, however, is estimated to have declined 11,000 or 1.4 percent.

Although Florida has had the greatest numerical population increase since 1970, Arizona was the leader among the States in both rate of growth, 16.1 percent, and rate of growth due to net migration, 12.1 percent. Trailing Arizona and Florida in rate of population growth were Nevada (12.1 percent), Colorado (10.4 percent), and Alaska (9.3 percent). Arizona, Florida, Nevada, and Alaska along with California have been among the top five in rate of growth for each of the past three decades, although the rankings within these five have undergone some transposition from decade to decade.

Table A. Comparison of Population Change by Components: Florida vs. California: 1940 to 1973

(Numbers in thousands. All rates expressed per 1,000 initial population)

Date	Population	Change from preceding date				Average annual rate of change[1]			
		Total	Natural increase	Net migration		Total	Natural increase	Net migration	
				Resident	Civilian			Resident	Civilian
FLORIDA									
April 1, 1940....	1,897	-	-	-	-	-	-	-	-
April 1, 1950....	2,771	874	296	578	568	35.9	14.5	26.6	26.3
April 1, 1960....	4,952	2,180	564	1,616	1,619	58.1	18.5	45.9	46.6
April 1, 1970....	6,789	1,838	511	1,336	1,344	31.6	9.8	23.7	24.4
July 1, 1973.....	7,678	888	107	782	788	37.8	4.8	33.8	33.5
CALIFORNIA									
April 1, 1940....	6,907	-	-	-	-	-	-	-	-
April 1, 1950....	10,586	3,679	1,031	2,688	2,588	43.7	13.8	32.6	32.0
April 1, 1960....	15,717	5,131	1,989	3,142	3,098	39.8	17.2	26.0	26.0
April 1, 1970....	19,953	4,236	2,123	2,113	2,116	23.9	12.7	13.6	13.9
July 1, 1973.....	20,601	648	511	137	139	9.8	7.8	2.1	2.2

- Represents zero.

[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This anomaly occurs because the calculations of average annual rate of change by component assumes no interaction between them.

Source: Current Population Reports, Series P-25, Nos. 72, 304, 480, and this report.

Florida's estimated 782,000 net in-migration was almost four times that of the 214,000 net migration into Arizona, Texas, Colorado, California, and Tennessee also had estimated net in-migration exceeding 100,000.

Arizona and Florida both had net in-migration rates of over 10 percent. Nevada with a net in-migration rate of 8.7 percent and Colorado with a rate of 7.2 percent were the only other States having net in-migration rates above 5 percent.

New York is estimated to have lost over one-quarter of a million residents through net out-migration, or 1.5 percent of its 1970 population. Ohio with a loss of 185,000 people through net out-migration led all the States in rate of net out-migration, 1.7 percent, followed by Washington with 1.6 percent. Other States with large amounts of net out-migration were Illinois, Michigan, and Pennsylvania.

The combined net civilian out-migration from New York, Ohio, Illinois, Michigan, and Pennsylvania was considerably higher than the total out-migration.

The total out-migration for these five States was slightly over 700,000 while the net civilian out-migration from these States was nearly one million. The reason for this disparity is that these States, which have very small resident military populations, were estimated to have gained nearly 300,000 residents by virtue of the large cutbacks in military personnel both within the United States and abroad since 1970. In mid 1973, the total world-wide military population of the United States was 2.3 million, a decline of about one million from the 3.3 million on April 1, 1970.

Several of the more striking developments in State growth patterns during the early 1970's deserve more elaboration. Among them are the following: (1) California's rate of growth has fallen sharply; (2) The industrial States in the Northeast and North Central regions are experiencing the slowest rates of population growth in the country; and (3) Many of the more rural States which previously had the highest net out-migration are for the most part experiencing net in-migration.

California. California has led the Nation in total growth for the past five decades, and between 1940 and 1970 its intercensal growth was at least twice that of any other State. In fact, in every decade of this century California's rate of growth was at least double the United States average, and over the entire seventy-year period its annual average-annual growth has been 3.7 percent. The remainder of the country has had an average-annual increase of 1.3 percent per year over the same time period.

The slowdown in growth is largely attributed to a decided turnabout in Los Angeles County. Los Angeles County, the largest in the United States, is estimated to have lost about 70,000 people from 1970 to 1973.[1] Between 1960 and 1970 Los Angeles County's population increased by almost exactly one million persons. During the previous two decades, the population increases in this county were 1.9 million in the 1950's and 1.4 million in the 1940's.

California's declining growth in this decade is not wholly unexpected. The State had average annual population increases of over 500,000 during the 1950's and the first half of the 1960's. However, during the latter part of the 1960's growth slowed to 300,000 per year. Since 1970, the State has had an annual growth of about 200,000.

Industrial North. For a large section of the Eastern United States population growth has slowed considerably as an increasing net out-migration has combined with a reduced rate of natural increase. Thirteen Northern industrial States, extending from Southern New England in the East and including Minnesota and Missouri in the West have had a combined growth rate of only 1.4 percent since 1970. The rate of growth in these States was less than one-third that of the remainder of the United States, which had a population increase of 4.9 percent. Not only is the growth since 1970 in these densely settled Eastern States low, but the annual increments of growth are shrinking over the three-year interval (table B).

Wisconsin's growth rate of 3.4 percent since 1970 is about equal to that of the United States. New Jersey's growth rate of 2.7 percent was second among these industrial States and it exceeded only two States, Washington and Kansas, which are not part of the industrial North. In the preceding three decades only Pennsylvania among the industrial States has consistently ranked in the bottom quarter of the States in terms of growth rate.

These industrialized States have had a substantial net out-migration in this decade. However, even a return to the migration levels of

[1]Population Research Unit, California Department of Finance, Population Estimates for California Counties, August 17, 1973. In Current Population Reports, Series P-25, No. 505, The U.S. Bureau of the Census estimates a decline of 42,000 between 1970 and 1972.

Table B. Comparison of Population Change by Components for 13 Northern Industrial States: 1970 to 1973

(Includes Mass., R.I., Conn., N.Y., N.J., Pa., Ohio, Ind., Ill., Mich., Wis., Minn., Mo. Numbers in thousands. All rates expressed per 1,000 initial population)

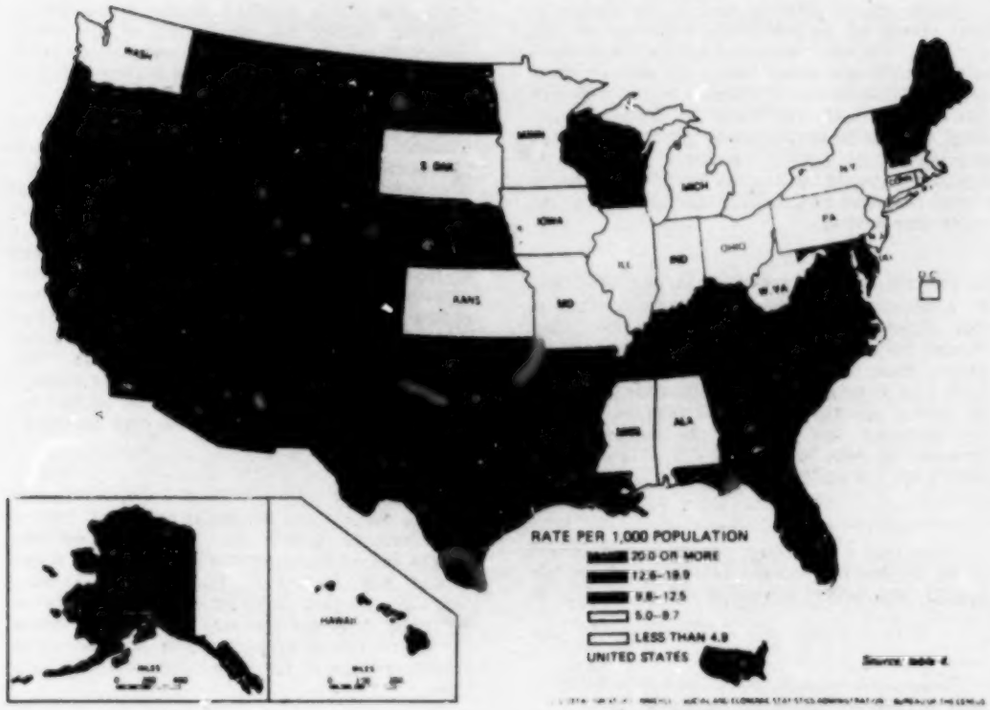
Date	Population	Change from preceding date				Average annual rate of change[1]			
		Total	Natural increase	Net migration		Total	Natural increase	Net migration	
				Resident	Civilian			Resident	Civilian
April 1, 1970....	95,610	-	-	-	-	-	-	-	-
July 1, 1971.....	96,549	940	908	32	-184	7.8	7.6	0.3	-1.3
July 1, 1972.....	96,882	333	559	-226	-395	3.4	5.8	-2.3	-4.1
July 1, 1973.....	96,946	64	439	-376	-385	0.7	4.5	-3.9	-4.0

- Represents zero.

[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This anomaly occurs because the calculations of average annual rate of change by component assumes no interaction between them.

Source: Current Population Reports, Series P-25, Nos. 72, 304, 480, and this report.

Figure 2. Average Annual Rates of Population Change: 1970 to 1973



the past would not produce substantial growth unless births move upwards from their present low levels (table C).

Considering all of these States as a unit, natural increase has consistently accounted for over 90 percent of the population increase since 1940. The rate of natural increase since 1970 is only two-thirds the level of the 1940's and 1960's and only one-half that of the 1950's.

The More Rural States. The growth in the more rural States in the country, has greatly accelerated since 1970. Ten rural Northern States with a combined population of 11 million in 1970 have had an estimated population increase of 366,000 since 1970 (table D). This increase in only 3-1/4 years was greater than that occurring in the previous decade.

The fact that the rate of growth in these States since 1970 is three times that of the 1960's is even more remarkable considering that these States were also experiencing declining birth rates as did the Nation as a whole.

All of these States except Kansas are estimated to have gained population through net in-migration, and even for Kansas the rate of net out-migration is considerably lower than in the 1960's. During the 1940's and the 1950's each of these States incurred net out-migration, and in the 1960's only Vermont had net in-migration.

Although the rate of migration change in those small Northern States is striking, the estimated numerical changes in net migration to the South are much more significant. The change in migration is more clearly focused with the elimination of Florida, Texas, Virginia, Maryland, Delaware, and the District of Columbia. The five States are not included because they have had consistent in-migration in each of the past three decades, and the District of Columbia is eliminated on the obvious grounds that it is not a State, but serves as the core of a large metropolitan area.

During both the 1940's and 1950's the remaining 11 States had net out-migration amounting to about 3-1/4 million (table E). Between 1960 and 1970 net out-migration was more than halved to 1.3 million, but since 1970 these States are estimated to have

Figure 3. Average Annual Rates of Population Change: 1960 to 1970

Table C. Comparison of Population Change by Components for 13 Northern Industrial States: 1940 to 1973

(Includes Mass., R.I., Conn., N.Y., N.J., Pa., Ohio, Ind., Ill., Mich., Wis., Minn., Mo. Numbers expressed in thousands. All rates expressed per 1,000 initial population)

Date	Population	Change from preceding date				Average annual rate of change[1]			
		Total	Natural increase	Net migration		Total	Natural increase	Net migration	
				Resident	Civilian			Resident	Civilian
April 1, 1940....	67,482	-	-	-	-	-	-	-	-
April 1, 1950....	74,990	7,508	6,848	661	1,254	10.5	9.7	1.0	1.8
April 1, 1960....	86,670	11,68.	10,794	887	1,202	14.5	13.4	1.2	1.6
April 1, 1970....	95,610	8,940	8,754	185	508	9.8	9.6	0.2	0.6
July 1, 1973.....	96,946	1,337	1,906	-570	-544	4.3	6.1	-1.8	-2.8

- Represents zero.

[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This anomaly occurs because the calculations of average annual rate of change by component assumes no interaction between them.

Source: Current Population Reports, Series P-25, Nos. 72, 304, 460, and this report.

a net in-migration of about 400,000. Unlike the Northern industrial States, there is very little difference between net resident migration and net civilian migration, since the net gain to the civilian population from the Armed Forces was in large measure countered by a decline in the resident military population.

Population and net migration by race. Current population estimates, by race, are not yet developed by the Bureau of the Census for States. Net interstate migration patterns vary significantly by race, as reflected in data from the past decennial censuses of population. Net out-migration of blacks from the South, particularly to the North and West, has been substantial over the past three decades-- roughly 1-1/2 million net out-migration per decade. Net out-migration of the white population was also heavy but only during the first two decades--1940 to 1960. In the 1960's there was a net in-migration of whites to the South.[8]

[8]See Current Population Reports, Series P-25, No. 460, "Preliminary Intercensal Estimates of States and Components of Population Change 1960 to 1970," June 1971.

Table D. Comparison of Population Change by Components for 10 Non-Southern Rural States: 1940 to 1973

(Includes Me., Vt., Iowa, N.D., S.D., Nebr., Kans., Mont., Idaho, Wyo. Numbers expressed in thousands. All rates expressed per 1,000 initial population)

Date	Population	Change from preceding date				Average annual rate of change[1]			
		Total	Natural increase	Net migration		Total	Natural increase	Net migration	
				Resident	Civilian			Resident	Civilian
April 1, 1940....	9,482	-	-	-	-	-	-	-	-
April 1, 1950....	9,886	404	1,139	-735	-654	4.2	11.3	-8.1	-7.2
April 1, 1960....	10,692	806	1,591	-785	-770	7.8	14.9	-8.3	-8.1
April 1, 1970....	11,020	329	1,099	-769	-724	3.0	9.8	-7.4	-7.1
July 1, 1973.....	11,386	366	230	136	77	10.1	6.4	3.8	2.1

- Represents zero.

[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This anomaly occurs because the calculations of average annual rate of change by component assumes no interaction between them.

Source: Current Population Reports, Series P-25, Nos. 72, 304, 460, and this report.

Table E. Comparison of Population Change by Components for 11 Southern Rural States: 1940 to 1973

(Includes W.Va., N.C., S.C., Ga., Ky., Tenn., Ala., Miss., Ark. La., Okla. Numbers expressed in thousands. All rates expressed per 1,000 initial population)

Date	Population	Change from preceding date				Average annual rate of change[1]			
		Total	Natural increase	Net migration		Total	Natural increase	Net migration	
				Resident	Civilian			Resident	Civilian
April 1, 1940....	27,925	-	-	-	-	-	-	-	-
April 1, 1950....	29,933	2,008	5,300	-3,295	-3,133	6.9	17.4	-12.6	-11.9
April 1, 1960....	32,164	2,231	5,609	-3,375	-3,343	7.2	17.3	-12.0	-11.9
April 1, 1970....	34,937	2,773	4,116	-1,343	-1,347	8.2	12.0	-4.3	-4.3
July 1, 1973.....	36,331	1,294	1,006	387	346	12.1	8.7	3.4	3.1

- Represents zero.

[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This anomaly occurs because the calculations of average annual rate of change by component assumes no interaction between them.

Source: Current Population Reports, Series P-25, Nos. 72, 304, 460, and this report.

Since 1970, survey data (CPS) suggest that net out-migration of blacks from the South has not continued, as in the past, and may have largely disappeared as a source of net in-migration for States in the North and West.[9] These differential and changing patterns of interstate migration of blacks and whites are undoubtedly reflected in, and are affecting the State population trends discussed above. Postcensal 1970 data by State, and their patterns are lacking and their impact on current State population growth and trends is not known.

METHODOLOGY

The population estimates contained in this report were largely developed by averaging the results of two methods. Both of these methods use current data to estimate population change since April 1970. These methods are: (1) the Census Bureau's Component Method II, which employs vital statistics to measure natural increase and elementary school enrollment data to estimate net migration; and (2) the ratio-correlation method, in which a multiple correlation estimating equation is applied to the changes in the distribution of four different series of data to estimate changes in population.[4] The series of data used in the ratio-correlation method are: (1) elementary school enrollment, (2) number of Federal income tax returns filed, (3) passenger automobile registration, and (4) data on the work force.

Both methods were used only to estimate the civilian population under age 65. Estimates of the Armed Forces and the population 65 and over were added as a last step. The population aged 65 and over was estimated by adding to the 1970 census population aged 65 and over the estimated change in the number of people enrolled under "Medicare" (the hospital and/or medical insurance program under Title XVIII of the Social Security Act) between April 1, 1970 and the estimate date. The number of Armed Forces in each State was estimated directly from Department of Defense reports showing the number of military personnel assigned to each installation, adjusted where necessary to reflect place of residence.

Component Method II. In Component Method II the procedure for estimating the civilian resident population under age 65 involves: (1) Subtracting an estimate of Armed Forces on April 1, 1970, from the 1970 census population that would be under age 65 on the estimate date (for July 1, 1973 this would be the population under age 61.75 on April 1, 1970); (2) adding births for the period between the 1970 census and the estimate date; (3) deducting an allowance for deaths (civilian plus military) occurring in this period to the population which would be under age 65 on the date of estimation; (4) adding an estimate of net civilian migration during the period of the population that would be under age 65 on the estimate date; and (5) adding an estimate of net movement between the civilian population and the Armed Forces (separations minus inductions plus military deaths) during the period.

The estimate of net civilian migration of the population under age 65 by Component Method II for each State was derived as follows: Net migration for children between exact ages 6.25 and 14.25 on the estimate date, for each postcensal period ending April 1, was developed on the basis of age data from the 1970 census together with fall school enrollment data for elementary grades 1 to 8 for 1969 and each later school year. The amount of net migration for school children in these ages was converted to a migration rate for these ages, and this rate was in turn converted to a migration rate for the entire civilian population under 65. These estimates of net migration and net migration rates relate to various postcensal periods and to cohorts with the indicated ages on the estimate date.

The procedure for converting the school-age migration rate to a migration rate for all ages under 65 was based on the relation of each State's net migration rate for females aged 5 to 64 (in 1970) for the 1965-70 period to the State's net migration rate for all children aged 5 to 14 (in 1970) for the 1965-70 period (a good approximation of the elementary school ages for the same period).[5] Rates for females were used rather

[9]Current Population Reports, Series P-20, No. 256, "Mobility of the Population of the United States: March 1970 to March 1973," November 1973.

[4]This is essentially the same method as the ratio-correlation method described by Goldberg, Schmitt, and others. See David Goldberg, Allen Feldt, and J. William Smit, "Estimates of Population Change in Michigan 1950-60," Michigan Population Studies No. 1, University of Michigan, Ann Arbor, Michigan, 1960, and Robert C. Schmitt and Albert H. Crosetti, "Accuracy of Ratio-Correlation Method for Estimating Post-Censal Population," Land Economics, Vol. XXX, No. 3 August 1954), pp. 279-280.

[5]Information on interstate migration by age for the period 1965-70 can be found in Census of Population, 1970, Subject Reports, Final Report PC(2)-2B, Mobility for States and the Nation, table 59.

than the rates for both sexes combined for 1965-70 to avoid the problems resulting from military migration. The absolute difference between the two rates for each State, as reflected in the figures for 1965-70, was assumed to have grown linearly over time and, hence, it was reduced to an annual figure by dividing by five. Values of the difference between the rates for each year between the 1970 census and the estimate date were obtained by cumulating the average annual differences. This value was then added to the school-age migration rate to give an estimate of the migration rate for the total civilian population under age 65. The annual adjustment for States (excluding the District of Columbia) ranged from -0.4 percent in Washington and Oregon to + 0.5 percent in Alaska and Nevada. For the District of Columbia it was + 1.0 percent, a value consistent with that found for other large central counties of metropolitan areas.

The birth and death statistics used in developing the estimates were provided by the individual State vital statistics offices. No adjustment was made for underregistration of births and deaths. Vital statistics for calendar years 1970 and 1971 were final, except for a very small number of States. Most of the States also provided provisional estimates of vital statistics for calendar year 1972. For those States not providing final vital statistics, it was necessary to convert provisional data tabulated by place of occurrence to place-of-residence data based on past relationships between occurrence and residence data. The number of births and deaths for the first six months of 1973 for each State was estimated by assuming (1) initially that they would be equal to one-half the 1972 calendar year totals and (2) then adjusting the State figures pro rata to the national total.

The estimated net movement of civilians into the Armed Forces for a given State was developed by (1) taking the difference between (a) the number of persons serving in the Armed Forces who reported that State as their preservice residence on the estimate date and (b) the number serving in the Armed Forces on April 1, 1970, who reported that same State as their preservice residence and (2) adding an allowance for former residents of the State who died while serving in the Armed Forces.

In the present application four changes have been introduced in Component Method II compared with the variation of the method used in previous reports:

1. Births no longer include an adjustment for underregistration. A recent study of the completeness of birth registration has shown that the completeness of reporting is very close to 100.0 percent and that the regional differences evident in the full scale test conducted in 1950 have largely disappeared.[8]

Also the source of the vital statistics employed in preparing the population estimates has been changed. Birth and death statistics were secured directly from the individual State vital statistics agencies rather than from the National Center for Health Statistics as before. This step was taken mainly because the data compiled by States were more timely, but also because these data are not based on a sample, as are the data from the National Center of Health Statistics.

The elimination of the adjustment for underregistration has its greatest effect in the population estimates for South Carolina, Arkansas, and New Mexico. In these three States, reported births had been adjusted upward by about 5 percent in the 1960's and would have been adjusted upwards by over 4 percent in this decade had the previous factors been used.

2. Medicare statistics are used here to estimate change in the population aged 65 and over directly. The coverage of Americans aged 65 and over by the "Medicare" program is almost universal. The 20 million people on the rolls in 1970 almost exactly matches the population 65 and over in the 1970 census. (Only for Florida and, to a lesser extent, for Arizona and northern New England is there much disparity between this source of information and the census.) Furthermore, the migration of this age group is not highly correlated with school-age migration. Hence, Medicare is a preferred source for estimating the population of the 65-and-over group. This modification restricts the application of the basic Component Method II procedure to the population under 65--about 90 percent of the total population. It has particular impact on the estimates for Florida, where migration of the aged population is so great, and is expected to improve the estimates for that State.

3. A number of modifications have been introduced in connection with the estimates of school-age migration. They are:

a. Grades 1 to 8 plus ungraded enrollment were substituted for grades 2 to 8 plus ungraded elementary enrollment. Formerly it had been assumed that the high attrition from grade 1 to grade 2, relative to the attrition between the other elementary grades, made the elimination of data for grade 1 desirable in estimating school-age migration. However, the increased numbers of pupils in special education programs in many school districts throughout the United States introduced the additional problem of how to allocate a share of the special and ungraded elementary students to grade 1. The estimating procedure using grades 1 to 8 plus "special and ungraded elementary" was tested for 1970 for comparison with the procedure using grades 2 to 8 plus "special and ungraded elementary." This test showed no advantage in using grades 2 to 8.

b. Ages 6.25 to 14.25 as of April 1 for any year were selected as corresponding best to grades 1 to 8 on the assumption of a universal entry into first grade in the calendar year in which the child attains his 6th birthday. With no skipping or failing of grades, the youngest first graders would then be 6.25 on April 1 of a particular school year and the oldest eighth graders would be 14.25.

c. Wherever possible, fall enrollment for a given school year is used as the measure of school enrollment for that school year for a State.[9] Fall elementary enrollment for school year 1972-73 is assumed to have the same relationship to the population aged 6.25 to 14.25 on April 1, 1973, as fall enrollment for school year 1969-70 had to the population 6.25 to 14.25 on April 1, 1970. Formerly, fall school enrollment for two consecutive school years was interpolated to obtain an enrollment figure for the intervening mid-year date. However, test calculations indicate that use of a single year's fall school enrollment yields a slightly lower average deviation from the 1970 census. Moreover, the use of fall enrollment has the additional advantage of making the provisional estimates more timely.

4. The procedural change which had the greatest impact on the estimates was the use of a factor specific for each State to convert the school-age migration rate to a migration rate for all civilians under age 65. These factors relate to a past period, however, and hence they may not reflect current age patterns of net migration.

[8] See Bureau of the Census, Current Population Reports, Series P-23, No. 460, p. 5, and Evaluation and Research Program, Test of Birth Registration Completeness, 1964 to 1968, PHC(E)-2, 1973.

[9] Some small non-State-funded schools still tabulate enrollment at the end of the school year.

The past practice of using a single adjustment factor based on the national data from the Current Population Survey did not allow for the variation in the relative levels of net migration rates by age that could be expected from State to State. Previously, the net migration rate of all ages for a particular State was assumed to be directly proportional to the rate of school-age migration for that State. The factor of proportionality for any particular year was derived from the annual March Current Population Surveys for the years since the last census and reflected the ratio of the gross interstate migration rate for the total population to the gross interstate migration rate for school-age children for the postcensal period.

The new procedure fails to allow specifically for the change over the estimating period in the relationship between the school-age migration rate and the "all-ages" migration rate resulting from the shift in the ages of these "cohorts" with the variation in the length of the postcensal estimating period. Because the ages of the children who were of school age on the estimate date would vary over the postcensal estimating period in relation to the length of the estimating period and because migration rates vary by age, the ratio of the migration rate of the total population to the migration rate of the school-age population would necessarily vary with the length of the estimating period. Theoretically, therefore, a variable ratio of migration rates should be used for estimating periods of different lengths, derived preferably from current information on the age distribution of migrants. Such an adjustment was not made in the current set of estimates, however, because the information necessary to measure the changing relationship of migration rates over the postcensal estimating periods 1970-71, 1970-72, and 1970-73, especially for States, was not available and because the migration rates for these short postcensal periods are relatively low. In any case, the procedure of adjusting the State figures for the "expected" population under 65 years of age (which incorporates the preliminary estimates of net civilian migration for States based on migration rates) to the national independently derived estimate of the civilian population under 65 years of age, as was done in preparing the present population estimates, takes care, in part, for the "age-exposure" problem noted here.

The assumption that the difference between the one-year migration rates of the two groups does not change from year to year and that the difference can be applied cumulatively for an entire decade is subject to error. In many cases, the assumption implies very roughly that the ratio of the cumulative rates covering varying periods

of calendar years does not change. If the age pattern of migration rates remains the same as in the 1965-70 period, this assumption would be approximately valid for a set of five-year postcensal estimates, i.e., the 1975 estimates.

Nevertheless, test calculations for 1970, representing 10-year postcensal population estimates for 1960 to 1970 and employing the age patterns of net migration for 1955-60, resulted in a perceptible reduction of the average percent error in the estimates, as compared with the previous method.

Analysis of migration data for the 1955-60 period from the 1960 census and of migration data for the 1965-70 period from the 1970 census indicates considerable variation from State to State in the age pattern of migration rates. States having a high proportion of their population in large urban centers have a tendency toward a higher net in-migration of "all ages" than of the school-age population, and the reverse is true for States having a high proportion of their population in the suburbs of large metropolitan areas. This tendency, which is much more evident at the county level, is generally a reflection of the peculiar migration pattern of young adults. Typically, they are no longer living with their parents, are too young to have children of school age, have very volatile migration, and move in patterns counter to the remainder of the population.

The Ratio-Correlation Method. In the ratio-correlation method, as applied here, the percent changes in the State distribution of four symptomatic variables from 1970 to the estimate year are used to estimate the percent changes in the State distribution of the civilian population under age 65 from 1970 to the estimate year. First, the percent changes in the State distribution of the population between 1970 and the estimate year are derived by the use of an estimating equation based on the relationships between four symptomatic variables and population for 1960 and 1970 in combination with current data for the symptomatic variables. This estimated percent change in the States' distribution of population is in turn multiplied by the share of the United States civilian population under age 65 that the State had in 1970. This second step yields a preliminary estimate of the State distribution of the civilian population under age 65 in the estimate year. As a third step, the figures in the preliminary distribution are adjusted proportionately to sum to 100.0 percent. The final step is to apply these distributions to an independent national estimate of the civilian population under age 65 in the estimate year. (In the remainder of this section, the term "population" will be used to refer to the "civilian population under age 65").

The estimate of the change in a States' share of the national population from 1970 to the estimate year is calculated from a linear estimating equation, fitted by the method of least squares, relating the percent change in the distribution of population between 1960 and 1970 and the percent change in the distribution of four symptomatic or indicator variables between the same two dates. The indicators are: (1) The number of students enrolled in elementary school, (2) the number of Federal income tax returns, (3) the number of registered passenger cars, and (4) the number of persons in the work force.

The basic estimating equation may be expressed as follows:

$$\hat{Y}_j = b_0 + b_1 X_{1j} + b_2 X_{2j} + b_3 X_{3j} + b_4 X_{4j}$$

where,

$$\hat{Y}_j = \frac{\hat{P}_j}{P}\ (197N) + \frac{P_j}{P}\ 1970$$

$\frac{\hat{P}_j}{P}$ 197N being the estimated proportion of the United States' population in State j in the estimate year, and

$\frac{P_j}{P}$ 1970 the proportion of the United States' population in State j at the time of the 1970 census.

and,

$$X_{1j} = \frac{s_j}{s}\ 197N + \frac{s_j}{s}\ 1970$$

$\frac{s_j}{s}$ being the proportion of all U.S. students enrolled in elementary school who are enrolled in State j. The superscripts refer to the year of the census or estimates. X_{2j}, X_{3j}, and X_{4j} are defined in a manner analogous to X_{1j}, with elementary school enrollment being replaced by the number of Federal income tax returns, the number of passenger car registrations, and the number of persons in the work force. The b's are constants derived from fitting the least squares linear estimating equation to the corresponding data for the years 1970 and 1960 for each of the States and the District of Columbia.

The procedure described above is dependent on the premise that a linear relationship does indeed exist between the change in the distribution of the symptomatic variables and the change in the distribution of population. If the linear

relationship between a given independent variable and the dependent variable is weak, relative to the linear relationship between other independent variables and the dependent variable, that particular independent variable will not be useful as an indicator of change in population and the resulting multilinear equation will not be as effective as it otherwise might be. The matrix of observations for the 1960-70 period yielded the following statistical relationships:

Variable	Coefficient of correlation (r)	Net coefficient of estimation (b)
Constant		.13
School enrollment	.934	.44
Federal income tax returns	.848	.08
Passenger car registrations	.818	.01
Work force	.948	.34

It should be recalled that the correlation coefficients indicate the relationship between the change in the population distribution and the change in the distribution of the symptomatic variable. The coefficient of multiple correlation is .987 and the standard error of estimate is .020.

The coefficient of multiple correlation is sufficiently high (or the unexplained variance is sufficiently low) for these four variables to be adequate for estimating population change in the 1970-80 decade. However, neither the changes in Federal income tax returns nor the changes in passenger car registrations had sufficiently high correlations with population, in comparison with the other variables, to yield high values of "b." In effect, the statistics on Federal income tax returns and passenger car registrations have negligible impact in estimating population change in the 1970-80 period when school enrollment statistics and work force statistics are employed in the estimating equation.

This weakness of two indicator variables, in itself, is not a problem provided that one or more other indicators are strong. If the indicator "strength" of school enrollment and/or work force were to decline after 1970, a new equation with heavier weights for Federal income tax returns and passenger car registrations would result and this equation would be far less satisfactory as an estimating device for the 1970-80 period.

For the 1960-70 period and the 1950-60 period as well, births had been one of the strongest indicators of population. The inclusion of births in an estimating equation for 1960-70 with the four symptomatic variables previously listed yielded a line having a standard error of only .014, as compared with .020 in the above table. At face value this was a better equation and births should ostensibly have been used to make postcensal ratio-correlation estimates for 1970-80. However, some States were in the process of removing restrictions on abortions in advance of the 1973 Supreme Court ruling. In these States, the decline in the number of births between 1970 and 1972 was much sharper than for the remainder of the Nation. As a result, the ratio-correlation estimate gave unrealistically low population estimates for these States. This was most apparent in the two largest States, California and New York. Because the population estimates were so unrealistic, a "reserve" equation eliminating births as an indicator of population had to be developed. Ideally, one hopes that the "reserve" equation is nearly as "strong" as the original equation. The optimal way of creating this result is to find additional variables highly correlated with population or to make some sort of a transformation of the variables already at one's disposal.

An examination of the basic data for the 1960-70 period revealed that the changes in the distribution of the number of Federal income tax returns, the number of passenger car registrations, and the size of the work force from 1960 to 1970 did not correlate closely with the change in the distribution of population because the hypothesis of linearity between the dependent variable and independent variable was not particularly applicable. In almost every Southern State the changes in the distribution of Federal income tax returns and passenger car registrations were considerably greater than the changes in the distribution of population. The changes in the distribution of the work force was in the same direction but the magnitude was not as marked. When the relationships of the previous decade, 1950 to 1960, were re-examined, the same phenomenon was noted. Clearly, some of the increase in these three variables in the Southern States over the past two decades reflected an increased level of affluence of the population of this Region. Elementary school enrollment which is compulsory by law, did not behave in a manner permitting prediction. The data in table F shows the effect of this increased level of affluence in terms of "area coverage ratios" for the three variables which depend directly on economic conditions.

An area coverage ratio represents the ratio of the rate for an area for a symptomatic variable (e.g., Federal income tax rate, or the percent

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Table F. Area Coverage Ratios for Symptomatic Variables for Selected Years, by Regions

Variable	Region	Actual ratios			Expected ratios	
		1950	1960	1970	1970 (based on 1950-60)	1980 (based on 60-70)
Federal income tax returns						
	Northeast	118.3	112.3	107.0	106.3	101.7
	North Central	110.6	103.3	100.8	100.0	100.0
	South	73.3	85.4	92.5	97.5	99.2
	West	104.0	103.2	102.7	102.4	102.3
Automobile registrations						
	Northeast	90.8	90.7	90.4	90.7	90.4
	North Central	112.9	104.4	101.6	100.0	100.0
	South	84.0	94.1	100.1	100.0	100.1
	West	127.7	118.4	110.8	109.1	103.2
Work force						
	Northeast	107.9	108.3	104.5	108.3	100.7
	North Central	106.4	101.9	100.9	100.0	100.0
	South	89.4	92.1	98.2	94.8	100.0
	West	95.2	98.2	99.1	100.0	100.0

of the population filing income tax returns) to the corresponding national rate at a given date, per 100, that is,

$$\frac{V_{ij}}{P_j} \div \frac{V_{i\,(U.S.)}}{P(U.S.)}$$

where V_{ij} = value of variable i for area j

P_j = population of area j

V_i (U.S.) = value of variable i for United States

P (U.S.) = population of the United States

Algebraically, these ratios are equivalent to the ratio of the area-of-U.S. proportion for the variable to the area-of-U.S. proportion for the population. (All of the basic calculations in this report were carried out with States as units but statistics for the regions are presented in Table F for illustrative purposes.)

The coverage ratios for 1950, 1960, and 1970 in table F provide evidence of fairly large interdecade change for the four regions of the United States although the changes are generally much smaller for 1960-70 than for 1950-60. For all the symptomatic variables except School enrollment the coverage ratio for the Southern States has been increasing quite rapidly and there have been concurrent declines in the other regions of the country. In general, there appears to be a trend toward convergence of the State values to the United States average. Accordingly, it was decided to transform the current reported data for each of these three symptomatic variables so as to allow for the tendency for the indicator variable to move at a faster or slower pace than population. In view of the fact, however, that the basic estimating equation already allows in part for the differences in the change of the indicator variables and the change in population, and that area rates for particular symptomatic variables are converging a limit of 100.0 was set for the projected coverage ratios. The State coverage ratios for 1970 used for the 1960-70 estimating equation were derived according to the following specific set of rules:

1. If the coverage ratio for any State was monotonically rising to 100.0 (i.e., $1950<1960 \leq 100.0$), then the estimated State coverage ratio for 1970 was established by linear extrapolation of the 1950-60 trend, with a value of 100.0 as an upper limit.

2. If the coverage ratio for any State was monotonically falling to 100.0 (i.e., $1950>1960>100.0$), then the estimated State coverage ratio for 1970 was established by linear extrapolation of the 1950-60 trend, with a value of 100.0 as a lower limit.

3. For every other situation the estimated State coverage ratio for 1970 was set equal to the coverage ratio in 1960. In these States, the coverage ratio was moving away from 100.0 between 1950 and 1960 and it was believed, therefore, that it would be hazardous to estimate the 1970 coverage ratio by projection.

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Here is an illustration of how the transformation of the data for the indicator variables for 1970 was accomplished. Assume that the number of Federal income tax returns filed for a given State was 800,000 in 1960 and 1,000,000 in 1970, and that the coverage ratio for that State was 118.3 in 1950 and 112.3 in 1960 (the figures for the Northeast). By rule (2) the expected coverage ratio for this State in 1970 would be 106.3, and the transformed number of Federal income tax returns for 1970 would be $\frac{112.3}{106.3} \times 1{,}000{,}000$, or 1,056,444. This transformed number would replace the original figure of 1,000,000 for 1970 and the reported Federal income tax returns for 1960 would remain at 800,000.

Assume further that the total number of Federal income tax returns filed was 70,000,000 in 1960 and 80,000,000 in 1970. Finally, assume that the sum of the transformed Federal income tax returns for all States in 1970 was 80,100,000. Then the value of X_{2j} used in formulating the estimating equation relating the change in the distribution of Federal income tax returns from 1960 to 1970 and the change in the distribution of population from 1960 to 1970 for that State would be $\frac{(1{,}056{,}444)}{(80{,}100{,}000)} \div \frac{(800{,}000)}{(70{,}000{,}000)}$ or 1.1540.

If the original reported numbers only are used, the equivalent statistic would be $\frac{(1{,}000{,}000)}{(80{,}000{,}000)} \div \frac{(800{,}000)}{(70{,}000{,}000)}$, or 1.0938.

The coefficients of the estimating equation based on transformed data are as follows:

Variable	Coefficient of correlation	Net coefficient of estimation
Constant	-	.14
School enrollment	.953	.26
Federal income tax returns	.959	.25
Passenger car registrations	.907	.04
Work force	.930	.31

The coefficient of multiple correlation is .986 and the standard error of estimate is .021.

The simple correlation of the change in the school enrollment distribution and the change in the distribution of population is the same for both the original and transformed data. Reported school enrollment statistics were not "transformed" because there did not appear to be any trend in the coverage ratio over time. The increase in the correlation coefficient for work force is minuscule but the transformed figures on Federal income tax returns and passenger car registrations yielded significantly higher simple correlation coefficients. This improvement is reflected in the higher weights assigned to these variables.

The equation $\hat{Y}_j = .14 + .26X_{1j} + .25X_{2j} + .04X_{3j} + .31X_{4j}$ was used to estimate the change in each State's share of population from 1970 to the estimate year. However, before this could be accomplished, the (X_{1j}) term for the estimate year was transformed according to the set of rules established above, with the appropriate modification of the years (i.e., 1950 is replaced by 1960, 1960 is replaced by 1970, and 1970 is replaced by 1980). After the estimated coverage ratio was established for 1980, linear interpolation was used to develop estimated coverage ratios for all the years between 1971 and 1973.

An example, illustrating the solution for X_{2j} in 1973, is as follows: Our hypothetical State is assumed to have the same State coverage ratio as the Northeast had in 1960 and 1970. Table F gives 101.7 as the estimated coverage ratio for 1980 and, by linear interpolation, the coverage ratio for 1973 would be 105.29. In 1973, the number of Federal income tax returns filed for the State was 1,025,000, as compared with 1,000,000 in 1970. Then, by the transformation rules, the number of returns filed for the State in 1973 would be set at $\frac{107.0}{105.29} \times 1{,}025{,}000$, or 1,041,647. The transformed 1973 figure would replace the reported figure of 1,025,000. The 1970 figure of 1,000,000 does not change. The number of Federal income tax returns filed in the United States was 85,000,000 in 1973 and the sum of all the transformed numbers for 1973 was 84,900,000. Then, the value of X_{2j} used in the estimating equation to estimate the change in the distribution of population from 1970 to 1973 for States is:

$$\frac{(1{,}041{,}647)}{(84{,}900{,}000)} \div \frac{(1{,}000{,}000)}{(80{,}000{,}000)} \text{ or } 0.9815$$

The major difference in the variation of the ratio-correlation method employed here from the variation employed previously was the transformation of the reported data for the three indicator variables to take direct account of the changes in "coverage ratios" for the three variables in each State. The rules for the transformation were based on empirical observations and strongly reflect a particular appraisal

of these observations. Nevertheless, there is strong empirical evidence for the basic premise that State values will converge to a national level at some future date and that the estimating equation based on the prior decade may not adequately allow for this convergence.

A second change was to limit the dependent variable to the civilian population under age 65; the total resident population was "employed" before. This change was made for the same reasons as described in the section on Component Method II.

Finally, both births and deaths have been eliminated as symptomatic indicators. Deaths were dropped because they are not highly associated with the population under 65. (Approximately two-thirds of the United States annual death toll of two million occur to the 10 percent of the population over age 65, while only one-third occur to the remaining 90 percent of the population.) Births were dropped for reasons set forth earlier.

Estimates for July 1, 1973, 1972, and 1971. The description of methodology in the previous section is applicable to the preparation of the provisional estimates for July 1, 1973 with one major modification. When these estimates were prepared, no information was available on Federal income tax returns and passenger car registrations for 1973. Hence the ratio-correlation estimate for July 1, 1973 was developed by using the standard ratio-correlation estimate for July 1, 1972 as a benchmark and a two-variable ratio-correlation estimate (school enrollment and work force) to measure the change from July 1, 1972 to July 1, 1973.

In addition to this one major modification, a number of minor changes were made in both Component Method II and the ratio-correlation method. These would not have any appreciable effect on any State's estimate. It is important to note that the provisional estimates developed in this report rely completely on current symptomatic data. In previous years the provisional series included a large element of extrapolation of the net migration component for the last year of the estimating period.

All estimates are subject to revision. Minor modifications in procedure are constantly being introduced into the estimating techniques. Of more importance is the fact that changes in "input" data for prior years are often introduced which can cause a sizeable change in successive population estimates for the same date. This is especially true since Current Population Reports, Series P-26 (Federal-State Cooperative Estimates for Counties), has become a regular part of the Bureau of the Census' series on population estimates. Data "input" which appears reasonable at the State level may be decidely unacceptable when apportioned among the individual counties. When these incongruities are discovered, the change in the county data is carried forth to the State estimates for the following year.

In spite of the problems involved in converting from provisional to revised numbers, the changes between one set of provisional numbers and the corresponding revised estimates are not great at the State level. The revised estimates of the resident population for July 1, 1972 appearing in this report differ from the provisional estimates for July 1, 1972 appearing in Current Population Reports, Series P-25, No. 488, by an average of 0.4 percent. Sixteen States had revisions of 0.5 percent or more, with the largest revision being 1.5 percent (Arkansas).

The differences between the revised estimates of population for 1971 in this report (second revision) and the revised estimates for the same date shown in Series P-25, No. 488 (first revision), are quite small. On the average, they are about half as great as the differences between the provisional estimates and the first set of revised estimates. The average difference is 0.2 percent, with a maximum of 0.8 percent in New Mexico and Hawaii. Six States had revisions of 0.5 percent or more.

Estimates for July 1, 1970. The methodology and data used in preparing these State estimates do not permit meaningful estimates of population change for periods of less than one year. Consequently, the net migration component for the period April 1, 1970 to July 1, 1970 was calculated by taking a proportional part of the estimated net migration for the period April 1, 1970 to July 1, 1971.[8] As a final step, these preliminary estimates of the individual components were adjusted proportionately to sum to the United States totals for the period April 1, 1970 to July 1, 1970.

LIMITATIONS OF THE ESTIMATES

The estimated change in population between two dates for a State consists of three elements; (1) births, (2) deaths, and (3) net migration. Net migration itself can be divided into two components: (a) net civilian migration and (b) net military migration. The latter reflects

[8]For convenience natural increase was derived in the same way although vital statistics by month are available.

(1) net change in resident Armed Forces station strength, plus (2) net interchange between the military population and the civilian resident population, plus (3) deaths of the military population in the State.

The statistics on births and deaths compiled by the vital statistics offices of the individual State Health Departments are considered quite accurate. Accordingly, any error made in estimating postcensal population change is assumed to be concentrated in the estimate of net migration, particularly the net civilian migration component.[9]

Intuitively, it is believed that the absolute error in the estimate of population change increases with the length of the estimating period but that the error does not increase linearly. Thus, the error in the estimate for the 3 1/4 year period is expected to be less than the error in the estimate for the 10 year period but the precise relationship is not known.

Criteria for Evaluating Estimates. In developing the methodology for making postcensal population estimates, one may identify four general criteria for evaluating the various methods:

1. Accuracy: Does a test of the procedure demonstrate its closeness to a predetermined standard (e.g., the census)?

2. Reliability: Are the estimates of population generated by various techniques supportive of one another?

3. Continuity: Are the annual estimates of population and, particularly, net civilian migration generally devoid of abrupt changes in pattern from year to year?

4. Demographic and statistical logic: Does the procedure conform to a logical model of how demographic changes occur?

A. Accuracy: When the postcensal estimates for 1970, based on the 1960 census, were evaluated against the 1970 census, it was found that these estimates varied substantially from the 1970 census. Not only was the average error (i.e., average percent deviation from the census) higher in 1970 than 1960 (1.64 in 1960 vs. 1.85 in 1970), but also there was a marked regional bias in 1970. The larger errors were generally confined to the Southern States and these errors had a strong positive bias, i.e., a substantially higher proportion of the estimates in these States exceeded the 1970 census counts than were below them.[10] Accordingly, a number of revisions were made in both Component Method II and the ratio-correlation method.[11] The results of the revisions appear in Table G.

Weighting the results of the two techniques equally yielded an average deviation from the 1970 census of 1.18 percent, with only 7 States having deviations greater than two percent. The largest individual State deviation was 3.2 percent.

The 1970 postcensal ratio-correlation estimates (modified procedure) were based on a linear estimating equation with equal weights for the four indicator variables rather than a linear estimating equation containing "actual" coefficients and providing a least squares solution. This course was taken because there was no satisfactory statistical basis for deriving the coefficients; data for 1940 would have been required but they were not available for all variables. The least squares coefficients that are being used to generate the current ratio-correlation estimates yield a line from which the individual observation differed by an average of 1.36 percent from the 1970 census.

B. Reliability: Tests of the two estimating procedures show a positive correlation between the "spread" of the two estimates and the error in estimating population; that is, the larger the difference between the two estimates, the larger the error in the estimates. This is to be expected, but the differences were not large. In 15 States, the two 1970 postcensal estimates were within one percent of each other, and in these cases the deviation from the 1970 census (as measured by the average of methods) was 0.96 percent. In 19 States the difference between the two methods for 1970 ranged from one to three percent and in these cases the deviation from the 1970 census (as measured by the average of methods) was 1.19 percent. For the remaining 17 States, those with "spreads" exceeding three percent, the deviation from the

[9]Another source of error in estimating population change is the difference in the amount of underenumeration between adjacent censuses. Between 1960 and 1970 the estimated difference in the amount of underenumeration for the United States was only 0.2 million. Estimates of underenumeration for individual States are not available at this time.

[10]See Meyer Zitter and David Word, "Did Intercensal Estimates go wrong in the 1960's? A view from the national level;" Proceedings of the American Statistical Association Social Statistics Section: 1971.

[11]A description of Component Method II and the ratio-correlation method as used during the 1960's can be found in Current Population Reports, Series P-25, No. 480.

Table G. Percent Deviation of Postcensal Population Estimates From Census Counts, by Method, for States: 1970 and 1960

(The "standard" procedure refers to the methodology used in the 1960's and the "modified" procedure refers to the methodology being used currently. Alaska and Hawaii are not included in the 1960 Summary)

Area	Component Method II			Ratio-correlation method			Average of methods		
	Modified procedure	Standard procedure		Modified procedure[1]	Standard procedure		Modified procedure	Standard procedure	
	1970	1970	1960	1970	1970	1960	1970	1970	1960
All States N=51 (N=49 1960)									
Average deviation	1.42	2.32	2.31	1.67	2.00	2.72	1.18	1.88	1.64
Deviations greater than 3%	16	24	21	18	21	27	7	19	13
Deviations greater than 4%	3	8	9	4	6	13	0	4	5
South N=17									
Average deviation	1.33	3.72	3.16	2.08	3.08	3.79	1.09	3.23	1.88
Deviations greater than 3%	6	13	8	8	12	9	3	14	6
Deviations greater than 4%	1	7	4	1	5	4	0	4	2
North and West N=34 (N=32 1960)									
Average deviation	1.47	1.62	1.87	1.46	1.47	2.68	1.22	1.17	1.51
Deviations greater than 3%	10	11	13	10	9	18	5	5	7
Deviations greater than 4%	1	1	5	3	1	9	0	0	3
Large States[3] N=16									
Average deviation	1.37	2.01	1.80	1.15	1.58	2.41	1.02	1.75	1.23
Deviations greater than 3%	5	7	6	3	5	8	1	6	3
Deviations greater than 4%	0	3	2	0	2	3	0	0	0
Medium-sized States[2] N=18									
Average deviation	1.47	2.56	1.80	2.08	2.73	3.29	1.20	2.59	1.37
Deviations greater than 3%	7	9	7	9	11	9	4	10	5
Deviations greater than 4%	1	5	2	2	4	4	0	4	1
Small States[4] N=17 (N=15 1960)									
Average deviation	1.52	2.37	3.48	1.72	1.83	3.56	1.30	1.18	2.41
Deviations greater than 3%	4	8	8	6	5	10	2	3	5
Deviations greater than 4%	1	2	5	2	0	6	0	0	4

[1]Estimating equation based on equal weighting of four variables.
[2]1970 population more than 4 million.
[3]1970 population between 1.8 million and 4.0 million.
[4]1970 population less than 1.8 million.

1970 census (again measured by the average of methods) was 1.35 percent.

The difference between the two sets of estimates tends to grow over time but the increase in the difference is moderate:

Year	Average percent difference between procedures[1]	Maximum percent difference between procedures
1971	0.54	2.7
1972	0.76	2.1
1973 (prov.)	1.02	3.3
1970 (base-1960)	2.37	8.3

[1]Disregarding sign of individual State differences.

C. Continuity: Annual estimates of civilian migration are not shown in this report since they are subject to a great degree of variability. Nearly all of the revisions in the estimates from year to year are reflected in this single component. Consequently, a relatively small upward revision in the estimate of the total population of a large State in one year, combined with a relatively small downward revision for that State in the following year may result in a very significant change in the estimated net migration in the intervening period. Nonetheless, it is important that the annual estimates of net migration have some degree of stability and that they do not shift erratically in direction and volume from year to year unless there is specific evidence to support such changes (For example, the Boeing Company in Seattle, Washington, has had large

year-to-year variation in employment over the past 15 years, and the annual estimates for the State of Washington in particular have fluctuated erratically but in a manner that appeared to be associated with changes in employment at Boeing.)

D. Demographic and statistical logic: In the selection of a method or specific procedure the technician may be faced with the question whether to prefer a procedure which on testing gives the more accurate results or to prefer a procedure which is theoretically superior. The problem arises in large part because the standard used to evaluate the estimating procedure--typically the census count--is itself subject to error and may give a misleading impression as to the "true" error characteristic of the procedure. The issue of an antithesis between empirical results and a theoretical model is more likely to arise when the average error of the methods becomes very small, perhaps smaller than the errors in some of the census counts.

The annual estimates of net migration for States are reflected in the annual estimates of the civilian population and are generally quite consistent from year to year.

We would generally expect the differences in annual net migration rates for adjacent years to be small and to tend toward zero. For example, the rate of net civilian migration between July 1, 1970 and July 1, 1971 should approximately equal the estimated rate of net civilian migration between July 1, 1971 and July 1, 1972, and the estimated rate of net civilian migration between July 1, 1971 and July 1, 1972 should approximately equal the estimated rate of net civilian migration between July 1, 1972 and July 1, 1973. The distribution of the 102 observations (51 areas (x) 2 sets of differences) between the annual rates of net civilian migration for States covering migration experiences over the first three years of the decade is as follows:

Annual differences in net migration rates	Number of observations
Less than 0.25 percent...	46
0.25 percent to 0.49 percent...	29
0.50 percent to 0.74 percent...	12
0.75 percent to 0.99 percent...	10
More than 1.00 percent...	6

Nearly three-fourths of the observed differences vary by less than one-half percent. Of the six cases where the estimated annual rate of net civilian migration for adjacent years varies by more than 1 percent, there are States (Florida, Arizona, and Alaska) which had extremely high annual rates of net migration. In these States, large fluctuations in the magnitude of net civilian migration in adjacent years could very well be valid.

SOURCES OF DATA

Most of the statistics used to prepare the State population estimates presented in this report were obtained from Federal and State government sources.

The Social Security Administration provided information on Medicare enrollees. The data on Armed Forces were made available by the Department of Defense. Births and deaths were obtained from each of the State vital statistics offices.

The U.S. Office of Education, individual State departments of education, Roman Catholic School systems throughout the country, and the Official Catholic Directory[10] were the major sources of the data on school enrollment. These statistics were augmented in selected States by enrollment data from Federally operated schools, Bureau of Indian Affairs schools, and Lutheran school systems.

Data on passenger automobile registration are published annually by the Bureau of Public Roads in Highway Statistics, and the number of individual income tax returns is published annually by the Internal Revenue Service in Statistics of Income, Individual Income Tax Returns. Annual work force data is published in the July issue of Area Trends in Employment and Unemployment, U.S. Department of Labor, Manpower Administration.

[10]Published annually by P.J. Kenedy and Sons, New York, N.Y.

Monthly data on the work force is available from the same source.

RELATED REPORTS

The following table shows related reports of population estimates for various areas of geography as published by the Bureau of the Census.

Area	Type of population	Estimate date(s)	Report number Series P-25[1]
United States	Age, sex, and race; components of change by race	1960 to 1973	519
States	Age	1973	518
States	Age	1971 and 1972	500
Metropolitan areas	Total	1971 and 1972	505, 517
Counties	Total	1971 and 1972	517
Counties in selected States	Total with components of change	1972 and 1973	P-26 Nos. 49—

[1]County population estimates for individual States are published under the auspices of the Federal-State Cooperative Program for population estimates in Series P-26.

ROUNDING OF ESTIMATES

Estimates presented in the tables of this report have been rounded to the nearest thousand without being adjusted to group totals, which are independently rounded. Percentages are based on unrounded numbers.

Table 1. PROVISIONAL ESTIMATES OF THE RESIDENT POPULATION OF STATES, JULY 1, 1973, AND COMPONENTS OF POPULATION CHANGE SINCE APRIL 1, 1970

Region, division, and State	July 1, 1973 (provisional)	April 1, 1970 (census)	Change, 1970 to 1973		Components of change			
			Number	Percent	Births	Deaths	Net migration	
							Number	Rate[1]
United States	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
REGIONS:								
Northeast	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTHEAST:								
New England	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Middle Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTH CENTRAL:								
East North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH:								
South Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST:								
Mountain	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pacific	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEW ENGLAND:								
Maine	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Hampshire	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vermont	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Massachusetts	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rhode Island	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MIDDLE ATLANTIC:								
New York	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Jersey	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST NORTH CENTRAL:								
Ohio	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Indiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Michigan	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wisconsin	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST NORTH CENTRAL:								
Minnesota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Iowa	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Missouri	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nebraska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Kansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH ATLANTIC:								
Delaware	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Maryland	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
District of Columbia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Georgia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Florida	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST SOUTH CENTRAL:								
Kentucky	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alabama	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Mississippi	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST SOUTH CENTRAL:								
Arkansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Louisiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oklahoma	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Texas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MOUNTAIN:								
Montana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Idaho	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wyoming	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Colorado	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Mexico	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Arizona	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utah	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nevada	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PACIFIC:								
Washington	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oregon	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
California	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alaska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Hawaii	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Z Less than 0.05 percent. [1]Percent of April 1, 1970 population.

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Table 2. PROVISIONAL ESTIMATES OF THE CIVILIAN POPULATION OF STATES, JULY 1, 1973, AND COMPONENTS OF POPULATION CHANGE SINCE APRIL 1, 1970

Region, division, and State	July 1, 1973 (provisional)	April 1, 1970 (census)	Change, 1970 to 1973: Number	Change, 1970 to 1973: Percent	Components of change: Births	Civilian deaths	Net movement from Armed Forces to civilian population	Net civilian migration: Number	Net civilian migration: Rate[1]
United States	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
REGIONS:									
Northeast	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTHEAST:									
New England	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Middle Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTH CENTRAL:									
East North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH:									
South Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST:									
Mountain	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pacific	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEW ENGLAND:									
Maine	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Hampshire	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vermont	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Massachusetts	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rhode Island	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MIDDLE ATLANTIC:									
New York	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Jersey	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST NORTH CENTRAL:									
Ohio	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Indiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Michigan	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wisconsin	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST NORTH CENTRAL:									
Minnesota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Iowa	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Missouri	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nebraska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Kansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH ATLANTIC:									
Delaware	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Maryland	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
District of Columbia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Georgia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Florida	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST SOUTH CENTRAL:									
Kentucky	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alabama	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Mississippi	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST SOUTH CENTRAL:									
Arkansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Louisiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oklahoma	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Texas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MOUNTAIN:									
Montana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Idaho	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wyoming	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Colorado	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Mexico	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Arizona	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utah	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nevada	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PACIFIC:									
Washington	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oregon	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
California	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alaska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Hawaii	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Z Less than 0.05 percent. [1]Percent of April 1, 1970 civilian population.

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Table 3. ANNUAL ESTIMATES OF THE POPULATION OF STATES: 1970 TO 1973

(In thousands)

Region, division, and State	Resident: July 1, 1973 (provisional)	Resident: July 1, 1972	Resident: July 1, 1971	Resident: July 1, 1970	Resident: April 1, 1970 (census)	Civilian: July 1, 1973 (provisional)	Civilian: July 1, 1972	Civilian: July 1, 1971	Civilian: July 1, 1970	Civilian: April 1, 1970 (census)
United States	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
REGIONS:										
Northeast	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTHEAST:										
New England	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Middle Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTH CENTRAL:										
East North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH:										
South Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST:										
Mountain	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pacific	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEW ENGLAND:										
Maine	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Hampshire	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vermont	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Massachusetts	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rhode Island	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MIDDLE ATLANTIC:										
New York	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Jersey	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST NORTH CENTRAL:										
Ohio	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Indiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Michigan	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wisconsin	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST NORTH CENTRAL:										
Minnesota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Iowa	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Missouri	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nebraska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Kansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH ATLANTIC:										
Delaware	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Maryland	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
District of Columbia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Georgia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Florida	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST SOUTH CENTRAL:										
Kentucky	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alabama	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Mississippi	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST SOUTH CENTRAL:										
Arkansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Louisiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oklahoma	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Texas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MOUNTAIN:										
Montana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Idaho	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wyoming	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Colorado	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Mexico	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Arizona	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utah	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nevada	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PACIFIC:										
Washington	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oregon	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
California	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alaska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Hawaii	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Table 4. AVERAGE ANNUAL RATES OF POPULATION CHANGE BY COMPONENT: SELECTED PERIODS 1940 TO 1973

(All rates expressed per 1,000 initial population)

Region, division, and State	Net change[1]				Natural increase				Net migration			
	1970 to 1973	1960 to 1970	1950 to 1960	1940 to 1950	1970 to 1973	1960 to 1970	1950 to 1960	1940 to 1950	1970 to 1973	1960 to 1970	1950 to 1960	1940 to 1950
United States	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
REGIONS:												
Northeast	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTHEAST:												
New England	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Middle Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NORTH CENTRAL:												
East North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West North Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH:												
South Atlantic	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West South Central	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST:												
Mountain	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pacific	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
NEW ENGLAND:												
Maine	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Hampshire	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vermont	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Massachusetts	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rhode Island	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MIDDLE ATLANTIC:												
New York	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Jersey	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Pennsylvania	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST NORTH CENTRAL:												
Ohio	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Indiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Illinois	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Michigan	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wisconsin	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST NORTH CENTRAL:												
Minnesota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Iowa	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Missouri	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nebraska	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Kansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
SOUTH ATLANTIC:												
Delaware	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Maryland	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
District of Columbia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Virginia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
North Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Carolina	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Georgia	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Florida	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EAST SOUTH CENTRAL:												
Kentucky	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tennessee	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alabama	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Mississippi	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
WEST SOUTH CENTRAL:												
Arkansas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Louisiana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oklahoma	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Texas	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MOUNTAIN:												
Montana	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Idaho	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Wyoming	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Colorado	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New Mexico	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Arizona	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utah	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nevada	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PACIFIC:												
Washington	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oregon	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
California	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Alaska	[illegible]	[illegible]	[illegible]	(NA)	[illegible]	[illegible]	[illegible]	(NA)	[illegible]	[illegible]	[illegible]	(NA)
Hawaii	[illegible]	[illegible]	[illegible]	(NA)	[illegible]	[illegible]	[illegible]	(NA)	[illegible]	[illegible]	[illegible]	(NA)

NA Not available. X Less than 0.05 percent.
[1]The average annual rate of natural increase and net migration do not necessarily add to the total average annual rate of change. This usually occurs because the calculations of average annual rate of change by component assume no interaction between them.
[2]Excludes Alaska and Hawaii for 1940 to 1950 period.

Table 5. PROVISIONAL ESTIMATES OF THE RESIDENT POPULATION OF STANDARD FEDERAL REGIONS, JULY 1, 1973, AND COMPONENTS OF POPULATION CHANGE SINCE APRIL 1, 1970

Standard Federal region	July 1, 1973 (provisional)	Change, 1970 to 1973			Components of change			
		April 1, 1970 (census)	Number	Percent	Births	Deaths	Net migration: Number	Net migration: Rate[1]
United States	[illegible]	[illegible]	[illegible]	3.3	11,198,000	6,311,000	1,731,000	0.8
Region I	12,151,000	11,847,186	303,000	2.6	382,000	377,000	88,000	0.8
Region II[2]	[illegible]	[illegible]	217,000	0.9	1,247,000	828,000	-203,000	-0.8
Region III	[illegible]	23,412,652	484,000	2.1	1,203,000	759,000	41,000	0.2
Region IV	33,752,000	31,886,145	[illegible]	5.0	1,858,000	1,042,000	1,034,000	3.3
Region V	44,784,000	44,057,747	726,000	1.7	2,442,000	1,343,000	-381,000	-0.8
Region VI	21,362,000	20,326,466	1,036,000	5.0	1,277,000	604,000	361,000	1.7
Region VII	11,483,000	11,230,303	248,000	2.3	384,000	369,000	33,000	0.3
Region VIII	5,988,000	5,577,375	410,000	7.4	347,000	154,000	233,000	4.0
Region IX[3]	34,080,000	32,854,287	1,160,000	4.6	1,380,000	823,000	418,000	1.8
Region X	6,754,000	6,510,730	236,000	3.7	246,000	188,000	77,000	1.2

[1]Percent of April 1, 1970 population. [2]Excludes Puerto Rico and Virgin Islands. [3]Excludes Guam.

Table 6. PROVISIONAL ESTIMATES OF THE CIVILIAN POPULATION OF STANDARD FEDERAL JULY 1, 1973, AND COMPONENTS OF POPULATION CHANGE SINCE APRIL 1, 1970

Standard Federal region	July 1, 1973 (provisional)	April 1, 1970 (census)	Change, 1970 to 1973		Components of change				
			Number	Percent	Births	Civilian deaths	Net movement from Armed Forces to civilian population	Net civilian migration: Number	Net civilian migration: Rate[1]
United States	[illegible]	[illegible]	7,020,000	3.5	11,180,000	6,299,000	920,000	1,208,000	0.6
Region I	12,089,000	11,780,000	319,000	2.7	382,000	376,000	41,000	33,000	0.4
Region II[2]	25,583,000	25,316,000	242,000	1.0	1,247,000	827,000	110,000	-286,000	-1.1
Region III	22,600,000	22,113,000	536,000	2.4	1,203,000	757,000	130,000	-8,000	(Z)
Region IV	33,342,000	31,317,000	2,014,000	6.4	1,855,000	1,041,000	145,000	1,006,000	3.3
Region V	44,716,000	43,968,000	794,000	1.7	2,442,000	1,344,000	114,000	-548,000	-1.3
Region VI	21,115,000	20,088,000	1,057,000	5.3	1,277,000	602,000	87,000	380,000	1.8
Region VII	11,412,000	11,147,000	266,000	2.4	384,000	288,000	54,000	16,000	0.1
Region VIII	5,907,000	5,487,000	411,000	7.5	347,000	154,000	25,000	188,000	3.5
Region IX[3]	23,620,000	22,487,000	1,125,000	5.0	1,380,000	831,000	86,000	457,000	1.8
Region X	6,673,000	6,404,000	268,000	4.3	249,000	188,000	23,000	88,000	1.3

Z Less than 0.05 percent
[1]Percent of April 1, 1970 population. [2]Excludes Puerto Rico and Virgin Islands. [3]Excludes Guam.

Table 7. ANNUAL ESTIMATES OF THE POPULATION OF STANDARD FEDERAL REGIONS: 1970 TO 1973

(In thousands)

Standard Federal region	Resident population					Civilian population				
	July 1, 1973 (provisional)	July 1, 1972	July 1, 1971	July 1, 1970	April 1, 1970 (census)	July 1, 1973 (provisional)	July 1, 1972	July 1, 1971	July 1, 1970	April 1, 1970 (census)
United States	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region I	12,151	[illegible]	[illegible]	[illegible]	11,847	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region II[1]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region III	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region IV	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region V	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region VI	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region VII	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region VIII	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region IX[2]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Region X	6,754	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[1]Excludes Puerto Rico and Virgin Islands. [2]Excludes Guam.

APPENDIX

Table A-1. COMPARISON OF PERCENT DEVIATIONS FROM 1970 AND 1960 CENSUS BY SELECTED METHODS

Division and State	Component Method II			Ratio-correlation			Average of methods		
	Modified procedure	Standard procedure		Modified procedure	Standard procedure		Modified procedure	Standard procedure	
	1970	1970	1960	1970	1970	1960	1970	1970	1960
NEW ENGLAND:									
Maine	-2.49	-0.86	0.12	-1.20	-0.88	-1.18	-1.85	-0.83	-0.12
New Hampshire	-1.44	-0.69	0.33	-2.53	-2.06	0.66	-1.99	-1.46	0.11
Vermont	0.32	-0.38	-2.91	0.55	-0.23	-6.18	0.56	-0.35	-4.54
Massachusetts	-3.07	-2.67	-0.18	-3.80	-2.65	3.01	-3.13	-2.74	0.92
Rhode Island	1.90	0.70	0.75	2.02	-1.06	0.98	2.62	-0.18	0.69
Connecticut	-1.09	-0.98	-2.33	0.17	-1.66	2.96	1.54	-1.21	0.28
MIDDLE ATLANTIC:									
New York	-1.08	2.21	-0.11	-1.63	1.17	0.40	-1.34	1.73	0.16
New Jersey	0.34	1.71	-1.94	1.40	-0.21	1.42	1.03	0.09	-0.08
Pennsylvania	-0.96	0.17	1.33	-0.18	-0.21	0.31	-0.34	-0.08	0.78
EAST NORTH CENTRAL:									
Ohio	1.22	0.94	3.08	2.10	1.36	-0.40	1.89	1.16	0.84
Indiana	-1.17	-1.36	-1.05	-1.12	-0.27	-4.53	-1.15	-0.95	-2.76
Illinois	-2.02	-1.98	3.03	1.40	0.82	1.21	-0.87	-0.84	1.03
Michigan	1.08	-0.80	3.47	0.20	-0.31	-4.15	0.66	-0.45	-0.84
Wisconsin	-3.18	-3.42	3.00	-0.70	-0.39	-1.36	-1.33	-2.37	0.74
WEST NORTH CENTRAL:									
Minnesota	-0.48	-0.87	0.24	1.09	-2.57	-2.80	0.40	-1.29	-0.82
Iowa	2.44	3.05	2.52	2.17	0.21	-4.87	3.00	1.18	-1.04
Missouri	0.36	0.80	-0.29	-0.07	0.89	-1.35	0.13	0.48	-0.82
North Dakota	1.19	3.71	0.38	0.60	-1.05	-6.42	0.84	1.22	-1.02
South Dakota	0.61	1.48	4.16	-0.30	-1.46	-2.90	0.17	-0.48	0.98
Nebraska	1.09	-0.86	1.21	-0.32	-1.88	-1.41	0.03	-1.07	1.26
Kansas	0.48	-1.17	-3.01	1.30	-1.18	-4.02	0.76	-1.10	-3.52
SOUTH ATLANTIC:									
Delaware	-0.94	-3.50	3.07	3.57	-1.22	-4.30	1.63	-0.54	-0.16
Maryland	-0.06	-3.06	-1.07	0.01	-4.06	3.08	0.03	-3.26	0.26
District of Columbia	0.00	-6.01	-17.10	-1.07	8.06	-1.34	-0.53	-1.82	-8.17
Virginia	0.74	1.01	0.48	0.44	0.18	-0.09	1.30	1.04	0.16
West Virginia	0.40	4.75	3.07	-1.09	2.07	-2.50	-1.23	4.21	1.09
North Carolina	0.32	2.37	1.60	-2.10	2.73	3.20	-0.84	3.06	1.08
South Carolina	4.00	7.30	3.30	-0.01	4.01	1.75	2.29	5.80	2.12
Georgia	-0.18	1.39	-1.01	-1.14	4.07	2.06	-0.75	3.73	0.68
Florida	-1.37	-4.71	-4.06	1.26	-0.33	10.16	0.01	-2.62	3.04
EAST SOUTH CENTRAL:									
Kentucky	-1.16	1.82	4.80	-0.80	3.60	-0.38	-1.07	1.04	3.30
Tennessee	0.51	1.06	-0.88	-3.28	3.82	-0.39	-1.58	2.45	-0.48
Alabama	2.30	4.74	0.20	-0.73	3.80	0.71	-0.23	3.77	4.40
Mississippi	2.21	3.42	3.22	-1.89	7.78	0.78	0.90	6.00	1.80
WEST SOUTH CENTRAL:									
Arkansas	0.71	4.94	-0.01	-7.00	4.05	5.90	-3.16	4.88	2.48
Louisiana	3.40	2.97	-3.20	-1.73	8.40	0.77	0.30	2.80	-0.81
Oklahoma	0.29	2.11	0.50	-0.38	1.09	-0.77	-0.75	3.06	-0.12
Texas	2.97	3.58	0.80	0.71	3.00	2.41	1.67	3.00	1.08
MOUNTAIN:									
Montana	0.31	3.86	1.00	-0.02	-2.76	-3.04	-0.28	0.61	-0.98
Idaho	-0.06	3.13	1.63	-1.31	1.52	-6.82	-0.64	2.38	-2.66
Wyoming	3.16	1.07	-1.61	-0.65	-1.88	-2.16	2.30	0.17	-1.78
Colorado	0.38	-1.37	-1.43	-0.37	-3.00	-0.86	-0.08	-2.43	-1.18
New Mexico	2.09	3.61	-5.77	-0.17	-1.01	-7.00	1.09	0.80	-6.09
Arizona	2.77	0.60	-0.03	-0.50	-0.06	-0.16	1.16	0.28	-0.58
Utah	0.06	0.73	1.00	-2.44	3.02	-3.21	-1.70	1.27	-1.12
Nevada	3.68	-3.80	3.56	0.90	-3.08	7.85	1.79	-3.99	4.88
PACIFIC:									
Washington	1.08	-0.84	-0.91	0.01	-3.32	-2.09	0.54	-1.82	-1.90
Oregon	2.98	0.02	0.66	2.17	-1.21	0.05	2.55	-0.19	0.44
California	0.06	-3.09	-4.11	2.77	-1.71	-3.48	1.61	-1.88	-3.78
Alaska	-1.30	-3.01	(1)	4.09	1.40	(1)	1.78	-0.80	(1)
Hawaii	-1.40	-0.23	(1)	4.30	0.82	(1)	1.32	0.28	(1)

[1] Postcensal 1960 estimates were not made for Alaska and Hawaii.

Table A-2. COMPOSITION OF STANDARD FEDERAL REGIONS

Standard Federal region	State or outlying area
Region I	Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut.
Region II	New York, New Jersey, Puerto Rico, Virgin Islands.
Region III	Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, West Virginia
Region IV	North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi.
Region V	Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota.
Region VI	Arkansas, Louisiana, Oklahoma, Texas, New Mexico.
Region VII	Nebraska, Kansas, Iowa, Missouri.
Region VIII	North Dakota, South Dakota, Montana, Utah, Wyoming, Colorado.
Region IX	Nevada, Arizona, California, Hawaii, Guam.
Region X	Alaska, Idaho, Washington, Oregon.

EXHIBIT 3

UNITED STATES DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
Washington, D.C. 20233

OFFICE OF THE DIRECTOR

May 21, 1975

Honorable Herman Badillo
House of Representatives
Washington, D. C. 20515

Dear Mr. Badillo:

This letter is a follow-up to the recent discussions between Mr. Zitter of my staff, and Paul Myer and other members of your staff, concerning the enumeration of illegal aliens in the decennial census. The discussion took place in the context of the possible impact by this group on the Voting Rights Act legislation currently in process.

The census is designed to include all persons living in the United States, as of the census date (April 1, 1970), except foreign citizens residing on the premises of an embassy, chancellery, etc. The term "living in the United States" also excludes persons or representatives of foreign governments temporarily visiting, or traveling in this country. In concept, therefore, foreign citizens who are "living" in the United States illegally should be included in the census count. In practice, of course, the inclusion of such persons ultimately depends upon the individual. Some illegal aliens are counted because they choose to do so. Other illegal aliens purposely avoid being enumerated. Obviously, any attempt to identify illegal aliens during the enumeration would not have been productive and could have created a public relations problem seriously damaging to the census as a whole. Given these circumstances, we cannot give you a clear-cut answer to the question as to whether the census data include illegal aliens and the possible number included in our count of the population. The best we can say is that an unknown number of illegal aliens are probably included in the count.

In the 1970 census, a question on citizenship status was asked of a 5-percent sample of the population. It is, therefore, possible for us in making determinations under the Voting Rights Act, which depends on 1970 census data, to provide the statistics for citizens only; however, since it is based only on a 5-percent sample, and therefore not available as a classifier for all census items, some estimation is involved in making the determinations. These should have only a marginal effect on the statistics and no impact on the actual determination. Since

the determination is based on citizenship, the number of illegal aliens in an area (regardless of whether we enumerated them or not) would have no impact on these computations.

Should you need any additional information along these lines we will be very glad to discuss this further with your staff.

Sincerely,

VINCENT P. BARABBA
Director
Bureau of the Census

POP:MZitter/DLevine:hc 5/20/75

cc: Commerce Congressional Affairs
Congressional Liaison
Mr. Ted Clemence
Mr. Siegel
Mr. Felton
Mr. Zitter
Pop. Div. Files

p+

EXHIBIT 4

May 23, 1975

Honorable Stephen J. Solarz
House of Representatives
Washington, D. C. 20515

Dear Mr. Solarz:

This is in response to Mr. Hurwitz' letter of May 15, 1975, concerning your need for data to be used in the deliberations of the possible extension of the Voting Rights Act of 1965.

I am enclosing a listing of States showing the alien population as a percent of the voting age population for April 1, 1970.

In the 1970 census a question on naturalization was asked of all foreign-born persons who were included in the 5 percent sample of the population. Thus, information was secured on the number of foreign-born persons having their usual residence in the United States who were aliens. This group would include aliens working and attending school here except those living in an embassy. It would include illegal aliens to the extent that they reported themselves, were reported by a member of the household, or were listed by a census enumerator. Although the primary reason for conducting the census, as set forth in the Constitution, is to provide a basis for the apportionment of members of the House of Representatives among the several States, the Constitution does not specifically limit the population to be enumerated to citizens. According to subsequent legislation and long-standing practice, the census has attempted to include the entire population which has its usual residence in the United States. Since no one can provide a carefully developed estimate of the total number of illegal aliens in the United States or their geographic distribution, it is not possible to make a definite statement regarding the impact of the presence of illegal aliens in the voting participation rate.

We are now preparing a special computer printout which will provide the number of aliens of voting age in each county and for towns in the New England States. This information should be available within a week.

Should you have further questions, you may contact Gilbert R. Felten of my staff directly on 763-5072.

Sincerely,

/s/

VINCENT P. BARABBA
Director
Bureau of the Census

Enclosure

GRFelten:paf 5/20/75
cc: Commerce Legislative Affairs, Cong Swanson, Giles, Starsinic, Felten.

ALIENS OF VOTING AGE AS A PERCENT OF THE POPULATION 18 YEARS AND OVER
APR. 1, 1970

State	Total Population 18 years and over	Alien Population 18 years and over	Percent
United States	133,546,310	2,887,005	2.2
Alabama	2,209,873	5,927	0.3
Alaska	182,264	2,402	1.3
Arizona	1,127,616	24,353	2.2
Arkansas	1,267,796	2,643	0.2
California	13,313,733	687,129	5.2
Colorado	1,432,901	17,890	1.2
Connecticut	2,010,546	70,084	3.5
Delaware	350,930	4,261	1.2
District of Columbia	532,255	17,260	3.2
Florida	4,678,851	203,302	4.3
Georgia	2,944,284	11,635	0.4
Hawaii	494,719	37,677	7.6
Idaho	449,392	4,154	0.9
Illinois	7,316,430	177,452	2.4
Indiana	3,352,468	23,803	0.7
Iowa	1,849,371	8,246	0.4
Kansas	1,501.356	8,818	0.6
Kentucky	2,104,325	5,155	0.2
Louisiana	2,253,877	14,048	0.6
Maine	649,629	12,613	1.9
Maryland	2,540,332	42,518	1.7
Massachusetts	3,812,357	122,875	3.2
Michigan	5,622,119	105,396	1.9
Minnesota	2,422,906	18,917	0.8
Mississippi	1,372,523	3,133	0.2
Missouri	3,123,156	17,373	0.6
Montana	441,150	2,761	0.6
Nebraska	975,727	5,862	0.6
Nevada	318,514	6,745	2.1
New Hampshire	483,344	10,129	2.1
New Jersey	4,782,021	165,466	3.5
New Mexico	609,584	7,927	1.3
New York	12,395,363	545,518	4.4
North Carolina	3,322,039	11,371	0.3
North Dakota	391,317	1,798	0.5
Ohio	6,911,877	75,536	1.1
Oklahoma	1,722,097	7,630	0.4
Oregon	1,393,305	17,825	1.3
Pennsylvania	7,943,746	85,654	1.1
Rhode Island	648,499	16,268	2.5
South Carolina	1,634,824	6,236	0.4
South Dakota	425,082	851	0.2
Tennessee	2,597,447	8,510	0.3
Texas	7,194,947	140,657	2.0
Utah	635,186	10,043	1.6
Vermont	287,745	5,568	1.9
Virginia	3,058,422	27,350	0.9
Washington	2,248,763	46,275	2.1
West Virginia	1,163,686	4,087	0.4
Wisconsin	2,833,283	25,865	0.9
Wyoming	212,333	1,809	0.9

EXHIBIT 5

Honorable John V. Tunney
Chairman, Subcommittee on
Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to a telephone request from Ben Dixon of your staff concerning your need for data relating to the possible extension of various provisions of the Voting Rights Act of 1965. Mr. Dixon requested information regarding the impact of aliens of voting age on voting participation rates for each Presidential election year, 1964 to 1972.

We have provided two tables showing:

1. For those jurisdictions covered by the 1970 Amendment to the Voting Rights Act of 1965, the percent of the citizen population voting in the Presidential election of 1968. Those covered areas which exceed 50 percent based on citizens of voting age are coded (g).

2. For November 1972, a listing of subdivisions with less than 50 percent voting based on the total voting age population and the citizen voting age population, and the actual percent voting. In those cases where the percent based on citizens exceeded 50 percent, the absolute value was suppressed and coded (g).

Unfortunately, similar data are not available for 1964 since our records are incomplete for that period.

I should emphasize that in the 1970 census a question on citizenship status was asked only of a 5-percent sample of the population, thus the figures are subject to sampling variability. For very small political subdivisions these sampling errors will and can affect the estimated level of citizen voter participation. For the few small jurisdictions in which the citizenship factor changes the voting rate significantly, we cannot say with certainty that they have exceeded the 50-percent mark until we have further evaluated the impact of sampling errors. The figures should be useful, however, in your deliberations on the possible extension of the Voting Rights Act.

2

If we can be of further assistance please contact Gilbert R. Felton of my staff directly on 763-5072.

Sincerely,

(signed) Vincent P. Barabba

VINCENT P. BARABBA
Director
Bureau of the Census

Enclosures

cc: Commerce Congressional Affairs

GRFelton:paf 6/11/75
cc: Congressional Liaison
Mr. Zitter
Mr. Starsinic
Mr. Felton
Pop Div File
Chron

UNITED STATES DEPARTMI
COMMERCE NEWS
WASHINGTON, D.C. 20230

EXHIBIT 6

CENSUS

Public Information Office
(301) 763-7273

For Release Thursday, September 4, 1975
CB75-196

CENSUS BUREAU LISTS STATES AND POLITICAL SUBDIVISIONS
WHERE SPECIAL ASSISTANCE FOR MINORITY VOTERS
WILL BE REQUIRED IN FALL ELECTIONS

The Census Bureau today identified five States, 224 counties, and 1 city which fall under the 1975 amendments to the Voting Rights Act, requiring these areas to provide special assistance in future elections to minority voters.

The list represents a first determination of which jurisdictions, among those announced by the Justice Department on August 28, fall under the law. Others will be determined in the near future.

The 1975 amendments to the act require special assistance to minority voters under the following conditions:

--Under Title II, where the Census Bureau determines that more than 5 percent of the citizens of voting age are members of a single-language minority; where less than 50 percent of the citizens of voting age cast ballots in the Presidential election of 1972; and also where the Attorney General determines that the counties conducted elections only in the English language in November 1972.

--Under Title III, where the Census Bureau determines that more than 5 percent of the citizens of voting age belong to a single-language minority and where the illiteracy rate is higher than the national average (4.6 percent).

Among language minorities covered are: Spanish heritage, Japanese, Chinese, Filipinos, Koreans, and American Indians; and in Alaska, native Alaskans (Eskimos and Aleuts) and American Indians. Illiteracy means the percentage of the citizen population 18 years and over with less than five years of schooling. Special assistance required under the act includes furnishing bi-lingual election materials and special monitors at polling places.

The act also specifies that the Census Bureau will make the statistical determinations of responsibility. In doing so, the Bureau used sample data from the 1970 Census of Population, the percentage of those casting ballots in 1972 from official voting records, and independent estimates of the voting age population of citizens for November 1972.

The list released today includes jurisdictions which could be determined at this time within 16 States with elections this fall. The status of other States and subdivisions will be announced according to the following schedule:

1. Jurisdictions in 32 other States where the requirements of the act can be readily determined but where no fall elections are scheduled.
2. Jurisdictions in the 16 States having fall elections but where the determination requires additional tabulation and further review of the data.
3. Jurisdictions in the other States where no elections are scheduled this fall and where additional tabulation and data review are required.

In addition, a separate listing will be prepared on the status of Michigan and Wisconsin where special determinations must be made for very small jurisdictions.

The list of States and subdivisions and the relevant language minorities released today is attached. The Attorney General has not yet made a final determination under Title II.

-X-

States or Political Subdivisions Covered Under 1975

Amendment to Voting Rights Act of 1965

State or Political Subdivision	Title II 1/	Title III 2/
Alaska (Statewide)	Native Alaskans	Native Alaskans
Arizona (Statewide)	Spanish	Spanish
Apache County	American Indian	American Indian
Cochise County		Spanish
Coconino County	American Indian	American Indian, Spanish
Gila County		American Indian, Spanish
Graham County		Spanish
Greenlee County		Spanish
Maricopa County		Spanish
Navajo County	American Indian	American Indian, Spanish
Pima County		Spanish
Pinal County	American Indian	American Indian, Spanish
Santa Cruz County		Spanish
Yuma County		Spanish
California (Statewide)		Spanish
Alameda County		Spanish
Colusa County		Spanish
Fresno County		Spanish
Imperial County		Spanish
Inyo County		American Indian
Kern County		Spanish
Kings County	Spanish	Spanish
Los Angeles County		Spanish
Madera County		Spanish
Merced County	Spanish	Spanish
Monterey County		Spanish
Orange County		Spanish
Riverside County		Spanish
Sacramento County		Spanish
San Benito County		Spanish
San Bernardino County		Spanish
San Diego County		Spanish
San Francisco County		Spanish, Chinese
San Joaquin County		Spanish
San Luis Obispo County		Spanish
San Mateo County		Spanish
Santa Barbara County		Spanish
Santa Clara County		Spanish
Stanislaus County		Spanish
Tulare County		Spanish
Tuolumne County		Spanish
Ventura County		Spanish
Yolo County		Spanish
Colorado (Statewide)		Spanish
Adams County		Spanish
Alamosa County		Spanish
Archuleta County		Spanish
Bent County		Spanish
Conejos County		Spanish
Costilla County		Spanish
Crowley County		Spanish
Denver County		Spanish
Eagle County		Spanish
El Paso County	Spanish	Spanish
Fremont County		Spanish
Huerfano County		Spanish
Jackson County		Spanish
Lake County		Spanish
La Plata County		Spanish
Las Animas County		Spanish

2.

State or Political Subdivision	Title II 1/	Title III 2/
Colo. Mesa County		Spanish
Montezuma County		Spanish
Montrose County		Spanish
Morgan County		Spanish
Otero County		Spanish
Prowers County		Spanish
Pueblo County		Spanish
Rio Grande County		Spanish
Saguache County		Spanish
San Juan County		Spanish
Weld County		Spanish
Connecticut		
Bridgeport		Spanish
Florida		
Dade County		Spanish
Hardee County	Spanish	Spanish
Hillsborough County	Spanish	Spanish
Monroe County	Spanish	Spanish
Louisiana		
St. Bernard Parish		Spanish
Minnesota		
Beltrami County		American Indian
Cass County		American Indian
Mahnomen County		American Indian
Mississippi		
Neshoba County		American Indian
New York		
Bronx County	Spanish	Spanish
Kings County	Spanish	Spanish
New York County		Spanish
North Carolina		
Hoke County	American Indian	American Indian
Jackson County	American Indian	American Indian
Robeson County	American Indian	American Indian
Swain County		American Indian
Oregon		
Jefferson County		American Indian
Malheur County		Spanish
Texas (Statewide)	Spanish	Spanish
Andrews County		Spanish
Aransas County		Spanish
Atascosa County		Spanish
Bailey County		Spanish
Bastrop County		Spanish
Bee County		Spanish
Bell County		Spanish
Bexar County		Spanish
Blanco County		Spanish
Borden County		Spanish
Brazoria County		Spanish
Brazos County		Spanish
Brewster County		Spanish
Briscoe County		Spanish
Brooks County		Spanish
Burleson County		Spanish
Caldwell County		Spanish

3.

State or Political Subdivision	Title II 1/	Title III 2/
Tex. Calhoun County		Spanish
Cameron County		Spanish
Castro County		Spanish
Cochran County		Spanish
Coke County		Spanish
Colorado County		Spanish
Comal County		Spanish
Concho County		Spanish
Cottle County		Spanish
Crockett County		Spanish
Crosby County		Spanish
Culberson County		Spanish
Dallam County		Spanish
Dawson County		Spanish
Deaf Smith County		Spanish
De Witt County		Spanish
Dimmit County		Spanish
Duval County		Spanish
Ector County		Spanish
Edwards County		Spanish
Ellis County		Spanish
El Paso County		Spanish
Falls County		Spanish
Fisher County		Spanish
Floyd County		Spanish
Foard County		Spanish
Fort Bend County		Spanish
Frio County		Spanish
Gaines County		Spanish
Galveston County		Spanish
Garza County		Spanish
Glasscock County		Spanish
Goliad County		Spanish
Gonzales County		Spanish
Grimes County		Spanish
Guadalupe County		Spanish
Hale County		Spanish
Hansford County		Spanish
Harris County		Spanish
Haskell County		Spanish
Hays County		Spanish
Hidalgo County		Spanish
Hockley County		Spanish
Howard County		Spanish
Hudspeth County		Spanish
Jackson County		Spanish
Jeff Davis County		Spanish
Jim Hogg County		Spanish
Jim Wells County		Spanish
Jones County		Spanish
Karnes County		Spanish
Kendall County		Spanish
Kenedy County		Spanish
Kerr County		Spanish
Kimble County		Spanish
Kinney County		Spanish
Kleberg County		Spanish
Lamb County		Spanish
Lampasas County		Spanish
La Salle County		Spanish
Live Oak County		Spanish
Lubbock County		Spanish
Lynn County		Spanish

4.

State or Political Subdivision	Title II 1/	Title III 2/
Tex. McCulloch County		Spanish
McMullen County		Spanish
Martin County		Spanish
Mason County		Spanish
Matagorda County		Spanish
Maverick County		Spanish
Medina County		Spanish
Menard County		Spanish
Midland County		Spanish
Milam County		Spanish
Mitchell County		Spanish
Nolan County		Spanish
Nueces County		Spanish
Parmer County		Spanish
Pecos County		Spanish
Presidio County		Spanish
Real County		Spanish
Reeves County		Spanish
Refugio County		Spanish
Robertson County		Spanish
Runnels County		Spanish
San Patricio County		Spanish
San Saba County		Spanish
Schleicher County		Spanish
Scurry County		Spanish
Sherman County		Spanish
Starr County		Spanish
Sterling County		Spanish
Sutton County		Spanish
Swisher County		Spanish
Taylor County		Spanish
Terrell County		Spanish
Terry County		Spanish
Tom Green County		Spanish
Travis County		Spanish
Upton County		Spanish
Uvalde County		Spanish
Val Verde County		Spanish
Victoria County		Spanish
Ward County		Spanish
Webb County		Spanish
Wharton County		Spanish
Willacy County		Spanish
Williamson County		Spanish
Wilson County		Spanish
Winkler County		Spanish
Yoakum County		Spanish
Zapata County		Spanish
Zavala County		Spanish
Virginia (none)		

5.

State or Political Subdivision	Title II 1/	Title III 2/
Washington		
Adams County		Spanish
Columbia County		Spanish
Ferry County		American Indian
Grant County		Spanish
Okanogan County		American Indian
Yakima County		Spanish
Wyoming		
Carbon County		Spanish
Fremont County		American Indian
Laramie County		Spanish
Sweetwater County		Spanish

1/ Jurisdictions in which more than 5 percent of the citizen population are members of a language minority and which had less than 50 percent voter participation in 1972. The Attorney General has not yet made a determination concerning a "test or device".

2/ Jurisdictions in which more than 5 percent of the citizen population are members of a language minority and the illiteracy rate is greater than the national rate.

No. 76-60

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

CYNTHIA L. ATTWOOD,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-60

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-40) is reported at 535 F. 2d 1259. The oral ruling of the district court (Pet. App. B-1 to B-9) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1) was entered on April 19, 1976. The petition for a writ of certiorari was filed on July 16, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Director of the Census and the Attorney General properly construed the coverage formula of Section 4 of the Voting Rights Act of 1965,

as amended by Pub. L. 94-73, 42 U.S.C. (and Supp. V) 1973b, in determining that the State of Texas is subject to its provisions.

2. Whether the two courts below correctly declined to determine the constitutionality of the language minority provisions of the Voting Rights Act as amended in 1975, on the ground that petitioners did not seek to convene a three-judge district court.

STATUTES INVOLVED

Pertinent portions of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94-73, 42 U.S.C. (and Supp. V) 1973b, are set forth in the Appendix, *infra*.

STATEMENT

Petitioners, the Governor and Secretary of State of Texas, instituted this action against the Attorney General of the United States, the Director of the Census and other federal officials seeking a temporary restraining order, and preliminary and permanent injunctive and declaratory relief, with respect to their obligations under the language minority provisions of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94-73, 42 U.S.C. (Supp. V) 1973b. Petitioners contended that the Attorney General and the Director of the Census incorrectly determined that the State of Texas became subject to the provisions of Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, by virtue of the 1975 amendments thereto.[1] Petitioners alleged,

[1]Section 4, as amended by the Act of August 6, 1975, Pub. L. 94-73, 89 Stat. 400-402, provides that a jurisdiction shall be subject to certain remedial provisions of the Act if it is determined by the Director of the Census and the Attorney General, respectively, that more than five percent of the voting age citizens of the jurisdiction are members of a single language minority, and that the jurisdiction provided any election materials or information only in English as of November 1972; and if it is determined by the Director of the Census that less than 50 per centum of the citizens of voting age were registered or that less than 50 per centum of such persons voted in the presidential election of 1972.

among other things, that they were entitled to a hearing prior to the determination by the Director of the Census and the Attorney General that the State of Texas was covered by Section 4 of the Act; that the Director of the Census had used inaccurate data in computing the number of citizens of voting age in Texas; that the Director misconstrued the 50 per centum portion of the Section 4 coverage formula; and, finally, that the Attorney General had misconstrued Section 4(d) of the Act. Petitioners asserted that if the Director and the Attorney General had not committed these errors, the State of Texas would not be determined to be covered by Section 4 of the Act. Petitioners did not request that a three-judge district court be convened under 28 U.S.C. 2282.

The single-judge district court granted the defendants summary judgment after hearing argument on their motion to dismiss and plaintiffs' motion for preliminary injunction. The district court ruled that neither the Voting Rights Act nor the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, afforded petitioners the right to an administrative hearing, and that, with regard to each of the issues of statutory construction raised by the plaintiffs, the interpretation of the Director of the Census was "rational, consistent with the purposes and meaning of the statute and consistent with the legislative history" (Pet. App. B-5 to B-6). The court declined to rule on any constitutional issues raised by the plaintiffs because it lacked jurisdiction (Pet. App. B-6), and

refrained from ruling on the issues raised regarding the Attorney General's determination because the Attorney General had not yet made that determination (*ibid.*)

The court of appeals unanimously affirmed. The court ruled that, to the extent that petitioners sought to enjoin application to Texas of the language minority provisions of the Voting Rights Act on the ground that a hearing was constitutionally required, the court lacked jurisdiction because such relief may be granted only by a three-judge district court subject to direct appeal to this Court (Pet. App. A-13). The court further ruled that neither the Voting Rights Act nor the Administrative Procedure Act provides for a hearing prior to the making of the determinations required by Section 4 of the Voting Rights Act (Pet. App. A-12 to A-17), and, indeed, that such a requirement would be inconsistent with the basic thrust of the Voting Rights Act (Pet. App. A-16). The court also ruled that the Director of the Census had correctly interpreted the Section 4 coverage formula (Pet. App. A-17 to A-37), and that the Attorney General had correctly interpreted Section 4(d) of the Act (Pet. App. A-37 to A-40).[2]

ARGUMENT

The court of appeals correctly rejected petitioners' challenges to the respondents' interpretation and implementation of the Voting Rights Act Amendments.

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[2]At the time of the hearing in the district court the Attorney General had not determined and, with the Director of the Census, published in the Federal Register, that Texas was covered by the Act. Such publication, by law, makes the determination effective. 42 U.S.C. 1973b(b). That determination was published on September 23, 1975, 40 Fed. Reg. 43746, after the decision of the district court. The court of appeals held that because requiring a new law suit would burden the parties and waste judicial resources, and the issue was purely one of law, it would consider petitioners' claims regarding the Attorney General's determination, within the limits of its jurisdiction (Pet. App. A-38).

Since the court's construction of the Amendments is consistent with the intent of the Congress and applicable decisions of this Court, and is not in conflict with any decision of any other court of appeals, review by this Court is not warranted.

1. Petitioners contend (Pet. 8-17) that the Director of the Census and the Attorney General misconstrued portions of Section 4 of the Voting Rights Act, as amended, in determining that the State of Texas is covered by its provisions. These contentions are without merit, as shown by the comprehensive opinion of the court of appeals, upon which we rely.

Petitioners argue that they are entitled to some form of an administrative hearing with regard to coverage under the Voting Rights Act (Pet. 19-22). As the opinion of the court of appeals indicates, there is neither an explicit nor implicit statutory right to an administrative hearing regarding coverage under Section 4 (Pet. App. A-14 to A-17). Indeed, the court concluded that to find otherwise would be "incongruous" and "inconsistent" with the purpose of the Act (Pet. App. A-15 to A-16).

Petitioners also claim that the Director of the Census miscounted the number of aliens in Texas and as a result erroneously concluded that Texas fell within the mathematical coverage formula of Section 4. They rely upon various non-Census estimates (Pet. 22-26). As the court below correctly recognized, however, Congress knew that all demographic data are imperfect. It determined, therefore, that the Director of the Census should rely upon his own data in making the computations necessary to determine coverage under the Act, because those data were at least based upon projections from an actual count (Pet. App. A-21). The court also found ample ground for concluding that the Director had given

proper consideration to the status of aliens in making his computations for purposes of Section 4 (Pet. App. A-23).

Petitioners also challenge (Pet. 8-13) the Director of the Census' interpretation of the portion of Section 4 which requires him to determine

> * * * that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

The Director of the Census has consistently interpreted the term "such persons" in the second clause, to refer back to "citizens of voting age" in the first clause. Under this construction of the provision in issue and similar portions of Section 4, a state comes within the coverage formula if either of two conditions is met: (1) less than half its total citizens of voting age were registered, or (2) less than half of its total citizens of voting age actually voted (Pet. App. 24). Petitioners contend (Pet. 8-13) that this construction makes the first clause meaningless, because no jurisdiction could ever be covered by the first clause without also being covered by the second. They urge therefore that the second clause refers not to half the state's voting age population who voted, but to half the state's registered voters who actually voted.[3] As the opinion of the court of appeals demonstrates, petitioners' interpretation is contrary to the legislative intent as shown by the history of the Act as originally passed in 1965 (Pet. App. A-28 to A-37). The Director's construction is supported by the testimony of the Attorney General and the Director of the

[3]In Texas more than half the state's voting age population was registered, but less than half actually voted on November 1, 1972. On the other hand, more than half of all registered voters voted on that day (Pet. 9-10).

Census during the Senate hearings in 1965 (Pet. App. A-29 to A-30). It is also supported by the interpretation given this provision by the United States Commission on Civil Rights (Pet. App. A-36). Finally, it is consistent with the application of this provision by this Court (Pet. App. A-36 and n. 68). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330.[4]

Petitioners argue (Pet. 13-17) that the Attorney General erred in refusing to apply Section 4(d) of the Voting Rights Act (App., *infra*, p. 4a) when making his determination whether the State of Texas is covered by Section 4. As the opinion of the court of appeals demonstrates (Pet. App. A-37 to A-40), Section 4(d) was not intended to apply to an initial coverage determination, but rather to a judicial determination under Section 4(a) of the Act that coverage should be terminated. This holding is firmly supported by the legislative history of the provision (Pet. App. A-39 to A-40).

2. Petitioners contend (Pet. 17-28) that even if the Director of the Census and the Attorney General properly construed the coverage provisions of the Voting Rights Act, as amended, the Act "is not appropriate legislation to enforce the privileges and immunities guaranteed by the Fourteenth Amendment" (*id.* at 17). Petitioners asserted challenges to the constitutionality of the Voting Rights Act in both courts below, but never requested

[4]Petitioners' proposed construction of the Section 4 coverage provisions of the Act—unchanged since the initial 1965 enactment—would have excluded the States of Georgia, Louisiana, and South Carolina from the coverage of the Act. This Court explicitly noted the Congress' contrary intention with respect to these three States (*South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 330) and, as the court of appeals stated, "[s]imilarly, the Congress clearly contemplated that Texas would be covered by the 1975 Amendments" (Pet. App. A-26 to A-27 and n. 54).

the convening of a three-judge court. The district court therefore refused to hear the constitutional issues (Pet. App. B-6). The court of appeals likewise ruled that it lacked jurisdiction (Pet. App. A-13 and n. 29):

> By statute, all applications for an injunction against the execution of an Act of Congress which is alleged to be unconstitutional must be heard in the first instance by a three judge district court. 28 U.S.C. §2282 (1970). * * * Since there was no such application here, the issue of constitutionality cannot properly be reviewed on the merits by this Court * * * .

Petitioners do not challenge the refusal of the courts below, on jurisdictional grounds, to consider their allegations that the Voting Rights Act, as amended, is unconstitutional. Instead, they merely assert these allegations again. The courts below correctly held that they lacked jurisdiction to grant injunctive relief on constitutional grounds. 28 U.S.C. 2282. Therefore the merits of petitioners' constitutional claims are not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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CYNTHIA ATTWOOD,
Attorney.

OCTOBER 1976.

DOJ-1976-10

APPENDIX

Voting Rights Act of 1965, 79 Stat. 438, as amended by the Act of June 22, 1970, 84 Stat. 315, and the Act of August 6, 1975, Pub. L. 94-73, 89 Stat. 400-402, 42 U.S.C. (and Supp. V) 1973 *et seq.*:

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been

made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in

the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

* * * * *

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

* * * * *

(f) (1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from

environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the languge of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 76-60

* * *

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,
Petitioners,

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Respondents.

* * *

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

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OPINION BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 535 F.2d 1259.

JURISDICTION

The Opinion of the United States Court of Appeals for the District of Columbia was entered on April 19, 1976. The Petition for Certiorari was filed on July 16, 1976, and was granted on December 6, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254 (1) and 2101 (e).

QUESTIONS PRESENTED

I.

Whether the Voting Rights Act of 1965 was improperly construed and interpreted by the Bureau of the Census, the Attorney General of the United States, the federal district court and the court of appeals so that the State of Texas was erroneously determined to be subject to the Act?

II.

Whether the Bureau of Census and the Attorney General of the United States failed to properly follow their respective statutory duties as imposed and prescribed by the Congress of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voting Rights Act of 1965, as amended, codified as 42 U.S.C. §1973, *et seq.*, forms the central core around which revolve the questions and issues presented by this brief. Pertinent sections of the Act are set out in the body of the brief.

The Tenth and Fourteenth Amendments to the United States Constitution are peripherally involved and are mentioned and discussed where pertinent to Petitioners' argument.

STATEMENT OF THE CASE

The Voting Rights Act of 1965, Public Law 89-10, as amended by Public Law 91-285 [42 U.S.C. §1973, *et seq.*] applied certain sanctions to those states or political subdivisions found to be within its scope. The test for coverage, as stated in former Section 4(b) [42 U.S.C. §1973b(b)], was:

> "The provisions of subsection (a) shall apply in any State or any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964."

The original Act did not apply to the State of Texas since Texas had no "test or device" as that term was defined in the original Act.

The 1975 amendments to the Voting Rights Act of 1965 (Public Law 94-73) amended Section 4(b) so as to read:

> "On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November, 1972."

The 1975 amendments also added Section 4(f) (3) [codified as 42 U.S.C. §1973b(f) (3)] which expanded the definition of "test or device" as follows:

"In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process including *ballots, only in the English language* where the Director of the Census determined that more than 5 per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority . . ." (Emphasis supplied.)

Thus, before the Voting Rights Act of 1975 would be applicable to the State of Texas, it was necessary that a number of determinations be made by the Attorney General or the Director of the Census, including:

(a) That five percent of the state's citizens were members of a single language minority [42 U.S.C. §1973b(f) (3)];

(b) That the state had a "test or device" which inhibited minority voting with voting procedures and voting materials produced only in the English language [42 U.S.C. §1973b(f) (3)]; and

(c) That the Director of the Census determines that less than fifty per centum of the citizens of voting age were registered on November 1, 1972, *or* that less than fifty per centum of such persons voted in the presidential election of November, 1972 [42 U.S.C. §1973b(b)].

Texas has not contested the first of the conditions since Texas had, *prior* to the amendment of the Voting

Rights Act of 1975, adopted legislation calling for bilingual materials in elections in any of its counties in which five percent or more of the inhabitants were persons of Spanish origin or descent. [See Senate Bill 165, attached as Exhibit G to the Affidavit of Mark White, attached to Plaintiffs' Original Complaint; Appendix to the Briefs, page 36, hereinafter referred to as "Appendix ____."] (However, see the discussion at page 21, *et seq.* of this brief which analyzes the conflicting methods used by Census and the Attorney General of the United States to identify persons of Spanish heritage.)

Texas, however, has consistently urged that, if the second and third requirements are properly construed and if proper figures are used, Texas is not covered. The affidavit and the testimony of Petitioner White, the chief election officer of the State, shows that as early as July 14, 1975, more than three weeks prior to the effective date of the 1975 amendments, he urged the Director of the Census to grant him a hearing so that he could ensure the use of proper statistical data. (Appendix 12, 20, 79.) Subsequently, further requests were made of the Director of the Census as well as of the Attorney General of the United States. (Appendix 12, 79.)

It has been the constant position of Texas that (1) more than fifty percent of the citizens of Texas of voting age were registered on November 1, 1972, if (a) the Bureau of the Census would not count, as citizens, aliens, both legal and illegal, and (b) if it would not count persons who by the laws of the State of Texas are not eligible to vote, including nonresidents and persons who are mentally incompetent; (2) that more than fifty percent of the persons registered to vote on November 1, 1972, did in fact vote in the presidential election of November, 1972, and that a proper interpretation of the statute calls for such a determination rather than a

determination of whether more than fifty percent of all citizens of voting age voted in the presidential election; or alternatively, (3) that the two requirements of fifty percent registered and fifty percent voting are mutually exclusive, the one intended to cover those states where voters were registered and the other intended to cover those states where voters were not registered and that Texas, having a registration law, was only required to establish that more than fifty percent of its citizens of voting age were registered; (4) that the Attorney General could not properly certify that Texas used a "test or device" since Texas eliminated any possible effect of its use of a "test or device" (English-only elections) by earlier passing its bilingual election act; and (5) that Texas was entitled to a hearing and the opportunity to present evidence to the Bureau of the Census and to the Attorney General of the United States before its determinations were made.

This suit was brought prior to the publication by the Attorney General of the United States or the Director of the Census of any findings made by them with reference to the applicability of the Act to the State of Texas. The action was brought seeking a declaratory judgment pursuant to Sections 2201 and 2202 of Title 28 of the United States Code (the matter in controversy exceeding the sum or value of $10,000 exclusive of interest and costs) with a prayer that the District Court restrain Census and the Attorney General from publishing any determination concerning the State of Texas in the Federal Register pending final resolution of the issues presented by this suit.

The suit was filed on September 8, 1975. On September 12, the Honorable Gerhard Gesell, United States District Judge for the District of Columbia, heard Plaintiffs' Motion for Temporary Restraining Order. The Court, at the conclusion of the evidence,

issued its oral ruling, finding that there was a genuine case or controversy over which it had jurisdiction, "both because of the nature of the Federal question and ... the authority presented to the Court in the Declaratory Judgment statute," but denying all relief to Plaintiff-Petitioners. (Appendix 142.) The Court granted Defendants' Motion for Summary Judgment, without notice of any setting or following the other procedures called for by Rule 56 of the Federal Rules of Civil Procedure, and dismissed the Complaint. (Appendix 151.)

Plaintiff-Petitioners appealed the Judgment to the United States Court of Appeals for the District of Columbia. That Court affirmed the Judgment on April 19, 1976, and review was then sought in this Court.

SUMMARY OF THE ARGUMENT

The Voting Rights Act, if properly construed and interpreted by the Bureau of Census, the Attorney General of the United States, and the Courts, in accordance with established rules of statutory construction, could not apply to the State of Texas.

Moreover, the Voting Rights Act was improperly *applied* by Census and the Attorney General so as to bring Texas within the coverage of the Act.

ARGUMENT

The determinations made by Census and the Attorney General of the United States, as ratified by the courts below, have required the submission of over five thousand Texas statutes, rulings and ordinances to the Attorney General for his approval or disapproval. Such submissions, from every level of Texas government, have required the expenditure of thousands upon thousands of man-hours in the preparation and

handling on the part of public officials in Texas. This expenditure of time is coupled with the substantial financial expenditure also necessitated by these submissions. The governing processes of Texas and its subdivisions have been made more costly and in some cases brought to a standstill.

The extraordinary power given to the federal executive under the Voting Rights Act over the governmental functions of a covered state must be carefully applied under the congressionally sanctioned provisions of the Act and within the limits on congressional power imposed by the doctrine of federalism.

The federal district court and the court of appeals erred in upholding the determinations made by Census and the Attorney General, which applied the provisions of the Voting Rights Act to Texas, for two reasons:

I. THE THRESHOLD STATUTORY PROVISIONS USED TO TRIGGER THE INCLUSION OF A STATE WITHIN THE AMBIT OF THE VOTING RIGHTS ACT WERE ERRONEOUSLY INTERPRETED BY THE COURTS BELOW.

A. *Census and the Court Below Misinterpreted the Statutory Duty of Census in Determining Coverage by the Voting Rights Act.*

As a prerequisite to the inclusion of a state within the coverage of the Voting Rights Act, the Bureau of the Census, acting under the authority of 4(b) of the Act [42 U.S.C. §1973b(b)], must determine:

> "that less than 50 per centum of the persons of voting age were registered on November 1, 1972,
>
> or
>
> "that less than 50 per centum of such persons voted in the presidential election of November, 1972."

As interpreted by Census and Justice (and the courts below), only the last clause is given effect, and the first clause is disregarded since the percent of those voting could never be greater than the percent of those registering, absent illegal voting by unregistered voters. No logical, legal reason exists for indulging in such an interpretation.

The most basic and fundamental rule of statutory construction requires an interpretation that gives meaning and effect to every word, clause and sentence of a legislative enactment. *United States v. Menasche*, 348 U.S. 528 (1955); 2A Sutherland, *Statutory Construction*, §46.06 (4th Ed. 1973).

An interpretation which satisfies this elementary rule of construction would require Census to determine that less than fifty percent of the citizens of voting age were registered to vote. If there were fewer than fifty percent, the determination by Census is complete; and a state is included within the terms of the Voting Rights Act if Justice makes the further required determination that the state has a "test or device" "for the purpose or with the effect of denying or abridging the right to vote..." If more than fifty percent of voting age citizens are registered, then Census must make the further finding: did "less than fifty percent of such persons" (i.e., those registered to vote) vote in the presidential election of November, 1972? If less than fifty percent of the

registered voters actually voted, then inclusion within the Act is indicated if the further, required determination by the Attorney General with respect to the state's "test or device" is made. If more than fifty percent voted, then there can be no coverage under the Act.

In 1972, Texas had 7,514,343 citizens of voting age (a Census figure disputed by Appellants but accepted arguendo as true here). (Appendix 156.) Five million two hundred thousand persons registered to vote in that same year (Appendix 83), or roughly sixty-eight percent of the "citizens of voting age." In the November, 1972, presidential election, 3,472,714 persons voted, roughly sixty-seven percent of those persons registered to vote. (Appendix 156.)

Alternatively, the fifty percent registered or fifty percent voting clauses could have been intended by Congress to provide alternative tests where some states have voter registration laws and others do not. The first part of the clause--did fifty percent register--would serve to include or exclude states with voter registration laws from coverage. The second portion of the clause--did fifty percent vote--would be applicable only where a particular state has or had no registration law.

Either of the suggested interpretations is more logical and more in keeping with the rules of statutory interpretation than that adopted by Census and Justice, and either interpretation suggested would exempt Texas from coverage under the Voting Rights Act.

Indeed, the court of appeals in its opinion below initially indicated agreement with Petitioners' first-suggested interpretation (to give effect to the entire sentence setting out the duties of Census) where the court observed at page 24 of its opinion:

> "At the outset, appellants would seem to have the better argument. It is a rule of statutory construction that legislative enactments be so construed as to give effect to all parts."

However, the court of appeals then rejected this elementary canon of construction and erroneously, by and through its application of legislative history, decided that Congress had intended only the second clause (a determination of whether fifty percent of persons of voting age did vote in the applicable presidential election) to be operative and to provide the standard for inclusion or exclusion. That court pointed to the colloquy during Congressional hearings when the Attorney General and the Director of the Census indicated that the first clause of the statute (a determination of the number of voting registrants) would be ignored. The court then assumed that this interpretation, made not by Congress but by witnesses appearing before the Congress, must be correct and should be followed by the courts. (The court of appeals admitted that if Petitioners' argument was accepted as correct, Texas would not be covered by the Voting Rights Act.)

However, the Congressional discussion of and the reference to the purported meaninglessness of the first clause (percentage of eligible voters registering to vote) *and* the continued inclusion of the first clause, suggest that Congress *intended that the first clause have meaning;* otherwise the clause would have been stricken from the proposed legislation. Certainly, in the context of the Congressional discussions, this interpretation that the first clause have vitality and meaning is more sensible; and the legislative history of the Voting Rights Act supports Petitioners' position that both clauses must have meaning. Under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court would seemingly agree

with Petitioners' contention inasmuch as the Court speaks of "two findings" which Census must make. 383 U.S. at 317. (Indeed, it would be difficult, if not impossible, for Congress to adopt Petitioners' interpretation of the statute given the reasoning of the courts below. If Congress had intended that Census first determine the percentage of voters "registered," how could that legislative body have done so? No clearer language could have been used, except possibly to add, "We, the Congress, really mean that the first clause is to be given force and effect; please give heed, Census and the courts.")

Moreover, there is a serious question as to whether the statutory construction tool of examining the legislative history should have been used in this case. This disputed statutory language is unambiguous to the literate American, and there is no place for the use of interpretative legislative history unless there is statutory ambiguity. *Caminetti v. United States*, 242 U.S. 470 (1917); *Barber v. Gonzales*, 347 U.S. 637 (1954). The desirability of giving effect to the words of a statute rather than to the uncertain intent of the legislative body in enacting legislation (especially here where legislative history can be said to support either Petitioners' view or to the interpretation announced by the court below) is illuminated by the preference expressed for deciding the meaning of statutory language

> ". . . by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. *That process seems to me not interpretation of a statute but creation of a statute.*" (Emphasis added.)

United States v. Public Utilities Commission of California, 345 U.S. 295, 319 (1953), Mr. Justice Jackson concurring. See also *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Legislative history apparently should have validity as an interpretative tool when it supports "the plain language" of a statute or, as indicated earlier, when the statutory language is not "plain"but is ambiguous. *Chandler v. Roudebush*, ___ U.S. ___ , 96 S.Ct. 1949 (1976).

This rewriting of the Voting Rights Act by Census, the Attorney General and the courts below should not be permitted, and this Court should give meaning to the entire statutory injunction to Census. Such a correct focus requires a conclusion that Texas is not within the operation of the Voting Rights Act.

B. *The Attorney General of the United States and Courts Below Misinterpreted the Statutory Duty of the Attorney General in Determining Coverage of the Voting Rights Act.*

In making his required determination to trigger the coverage of Texas by the Voting Rights Act, the Attorney General merely ascertained that Texas had a "test or device," i.e., English-only elections as provided for by Section 4(b). No consideration was given to the statutory requirement that

> "[N]o State . . . shall be determined to have

> engaged in the use of tests or devices . . . if . . . the continuing effect of such . . . (use) has been eliminated and . . . there is no reasonable probability of their recurrence in the future." (Section 4(d) of the 1965 Act.)

If the Attorney General had given effect to this provision, he *could not* have made the requisite determination that Texas used a "test or device."

Certainly with the passage of the Texas bilingual election act, the consequence of English-only elections has been effectively "eliminated," and there is no "probability" of English-only elections in the future. (See Texas Acts 1975, 64th Leg., page 511, Ch. 213, codified as Article 1.08a, Texas Election Code.)

Moreover, Texas has not "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race and color" [Section 4(d) of the Voting Rights Act, 42 U.S.C. §1973b(d)]. It surely cannot be said that Texas instituted English-only elections in 1845 with the purpose of denying the right to vote since English-only elections were the *only* type of elections held in 1845 by *all* then-existent states. Additionally, the use of English-only elections has not been demonstrated to have had an appreciable effect on the voting of Spanish-surnamed persons. For example, in the year 1974 (an off-presidential election year) seventy-five percent of eligible voters registered to vote in Texas. (Appendix 17.) In those counties having a population with over fifty percent persons of Spanish-surname, seventy-two percent of eligible voters registered. (Appendix 17.) In addition, there was only .45 of one percent less voter turnout in the high Spanish-surname counties than in counties with a smaller representation of Spanish-surnamed individuals. (Appendix 17.) Furthermore, in

the over fifty percent Spanish-surnam counties, there was actually a greater percentage of *registered* voters who turned out to vote, than in counties with less than five percent Spanish-surname population (Appendix 17, 97.)

Certainly, the foregoing figures rather conclusively demonstrate that there was and is no showing here of discrimination in voting by Spanish surnamed persons.

Indeed, the representative of the Attorney General of the United States, in testifying before Congress during consideration of the Voting Rights Act Amendment of 1975, stated that evidence did not exist justifying the inclusion of Texas within the coverage of the Act. (Appendix 18.)

Like the Attorney General, however, the court of appeals concluded that Section 4(d) of the Act, providing linguistic calipers for the measuring and determination of certification by the Attorney General of the use of a "test or device," was inapplicable. The court held that the limiting factors of Section 4(d) were intended to apply only when a state has instituted a Section 4(a) suit to terminate coverage. However, Section 4(d) applies to all of Section 4 and the court's interpretation is erroneous when the statute is read in its entirety.

Section 4(a) does provide, as the court of appeals noticed, for termination-of-coverage (or bailout) suits by a state. More critically, Section 4(a) is the general operative part of the entire Section and provides in part that:

> "no citizens shall be denied the right to vote because of his failure to comply with any test or device in any state . . ."

Section 4(b) then provides, in pertinent part, that the Attorney General shall determine whether a state has used "any test or device."

Section 4(c) defines a "test or device" as does Section 4(f) (3) which includes the English-only language election within the definition of "test or device."

Next, Section 4(d) *further defines* the term "test or device" by setting out circumstances which must be considered and decided by the Attorney General *before* he can certify that a state has engaged in the use of a "test or device." No test or device can be certified as having been used by a state if

> "(1) the incidents have been few . . . and have been corrected by State . . . action,
>
> "(2) the continuing effect of such incidents has been eliminated, and
>
> "(3) there is no reasonable probability of their recurrence in the future."

Notice must be taken that Section 4(d), containing the standards for determining whether a "test or device" has been used, begins by stating:

> *"For the purposes of this section . . ."* (Emphasis added.)

This introductory phrase can *only* mean that the 4(d) qualifying factors apply to the whole section, including the 4(b) determination of "test or device" and not merely to 4(a) as held by the court of appeals.

It thus seems grammatically inescapable that the take-out modifiers of Section 4(d) *must be used* by the Attorney General in making his *determination* of coverage under Section 4(b).

As demonstrated above, then, the Attorney General in determining whether Texas used a "test or device"should have considered the following:

(1) Whether Texas, in the past, used English-only elections (the finding must, of course, have been that Texas did uniformly hold such elections);

(2) Whether incidents of discrimination have been few in number and whether the incidents have been corrected by state action (the new Texas Bilingual Election statute, Texas Election Code Ann., Art. 1.08a, has accomplished the required correction);

(3) Whether the continuing effect of English-only elections has been eliminated (again, the Texas Bilingual Election statute has satisfied this requirement); and

(4) Whether there is no reasonable likelihood of recurrence of any problem presented by English-only elections in the future (and again, of course, the Bilingual Election statute ensures against recurrence).

This Court can and should correct the erroneous interpretation of Section 4(d) of the Voting Rights Act, indulged in by the Attorney General and approved by the court below, so as to require the application of 4(d) to any determination by the Attorney General in determining coverage by the Act. The record supports a determination that the bilingual voting now existent removes Texas from the coverage of the Act. At the very least, a remand should be ordered requiring that the Attorney General properly apply and take into account the provisions of Section 4(d).

However,

II. EVEN IF PETITIONERS' STATUTORY CONSTRUCTION ARGUMENTS

ARE REJECTED BY THIS COURT, THE BUREAU OF CENSUS AND THE ATTORNEY GENERAL OF THE UNITED STATES FAILED TO FOLLOW THEIR RESPECTIVE STATUTORY DUTIES AS IMPOSED BY THE CONGRESS OF THE UNITED STATES IN THE VOTING RIGHTS ACT.

A. *The Refusal of the Director of Census and the Attorney General to Grant Some Sort of Hearing or Forum to Permit Texas to Submit Evidence and Argument on the Nonapplicability of the Voting Rights Act to Texas was Arbitrary and Invalid.*

As early as July 14, 1975, Texas Secretary of State Mark White began attempts to secure an audience before the Director of the Census and the Attorney General in order to submit evidence and present his contentions as to the coverage or noncoverage of Texas by the Voting Rights Act Amendment of 1975 (it had become evident at that time that the Amendment would become effective within a short time). (Appendix 12, 20, 79.) Additionally, repeated requests for some sort of hearing were made by both the Secretary of State and the Governor of Texas. (Appendix 12, 79.)

On September 2, 1975, White was advised by telegram from J. Stanley Pottinger that Census would "provide . . . the opportunity . . . to provide any data and supporting documentation relevant to his (Census) determination . . . (and) your (White's) data will be received and considered fully and fairly." (Appendix 13, 79.) A meeting was scheduled for September 5, 1975.

(Appendix 14, 79.) While in preparation for the promised hearing, the Secretary of State of Texas learned that Census had already determined the issues to be discussed at the hearing. *Because*, on September 4, 1975, the Bureau of Census issued a *press release*, without any prior notice to Texas, announcing that Census had determined that Texas was covered by the Voting Rights Act. (Appendix 14, 80.)

The scheduled, but abortive and then futile, September 5 meeting was nevertheless held, at which time White presented his views and documents. He also learned that the Director of Census in arriving at the number of "citizens of voting age" in Texas on November 1, 1972, employed the following procedures:

(a) Disenfranchised persons, such as persons convicted of felonies and adjudicated lunatics were included in the tabulation as were nonresidents, military personnel and students (Appendix 15, 90, 156);

(b) No consideration was given to the statutory language requiring the determination of whether "less than 50 per centum of the citizens of voting age were registered on November 1, 1972" (Appendix 14, 156);

(c) No current or 1972 figures for the number of aliens in Texas as compiled by and available from the United States Bureau of Immigration and Naturalization were used to exclude such aliens from "citizens of voting age" (Appendix 15, 89, 156); and

(d) A separate standard was used in the case of Texas (and in four other states) to determine "persons of Spanish heritage" so that all persons with Spanish surnames were held to be includable without regard to whether they have English language capability or even whether they can speak or read the Spanish language

(Appendix 15, 28, 92).

A meeting was later held before members of the United States Attorney General's staff, but White was not permitted to offer evidence, comments, criticisms, or arguments as to the applicability of the Voting Rights Act to Texas. (Appendix 93, 105-107.) The Attorney General never offered any sort of hearing or audience to Texas before determining that it was covered by the Act. (Appendix 14, 24, 80.)

Surely some opportunity to demonstrate noncoverage and some elements of fair play must be offered and accorded to a state. Anything less would raise serious constitutional problems concerning the Act because the means chosen by Congress to protect voting rights would not satisfy the Fourteenth Amendment "appropriate legislation" requirement.

It should be recognized that this case presents a different posture than does the case of *South Carolina v. Katzenbach*, since Texas has consistently challenged (before publication in the Federal Register) the figures used by Census and the interpretation of the Act by both Census and the Attorney General. And, unlike the situation in *Katzenbach*, there has arisen a "plausible dispute." 383 U.S. at 333. If the determination made by Census and the Attorney General were not the "objective statistical determinations" nor "routine analysis of state statutes" *(Katzenbach*, 383 U.S. at 333) as Petitioners have consistently urged, then some opportunity for a hearing before these agencies must be required.

Some means simply must be provided for a sovereign state to challenge the interpretations of the Act used by Census and the Attorney General before some administrative officer (not Congress) rules in such fashion as to trigger coverage.

The need and constitutional necessity for some form of hearing is cogently illuminated by the discussions which follow.

B. *The Anomolous and Conflicting Methods Used by Census on Instructions of the Attorney General to Determine Persons of Spanish Heritage Illustrates the Arbitrary Application of the Voting Rights Act by the Attorney General.*

While Texas has not complained of the determination made by Census--that "more than five per centum of its citizens of voting age . . . are members of a single language minority" (an initial finding which must be made to trigger coverage where the only "test or device" employed is the holding of English-only elections [Section 4(f) (3)], the manner used to determine the minority, persons of Spanish heritage in the case of Texas, aptly illustrates the arbitrary application of the Voting Rights Act by the federal executive arm.

In determining the five percent language minority, the Attorney General instructed Census as follows:

> "The Act does not define the term 'persons of Spanish heritage.' The legislative history indicates that the Director of the Census is to identify such persons as: 'persons of Spanish language' in 42 states and the District of Columbia; 'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico, and Texas; and 'persons of Puerto Rican birth or parentage' in New Jersey, New York, and Pennsylvania."

(Exhibit F to the Affidavit of Mark White, attached to Plaintiffs' Original Complaint, Appendix 28.)

If "persons of Spanish heritage" had been calculated for Texas, as it was in "42 states and the District of Columbia," by identifying "persons of Spanish language" only, then it is very probable that Texas would not have been included within the Voting Rights Act by virtue of the five percent language minority test--the first finding to be made before any of the other triggering elements are applied.

Certainly more than five percent of Texas' citizenry has Spanish surnames. But there is also the strong probability that less than five percent of Texas' citizens cannot speak English. Many of Texas' Spanish-surnamed citizens are descendents of persons who were in Texas before the English speaking peoples settled in the state. And most of the Spanish-surnamed citizens have been born in Texas and have been speaking, reading and writing English since birth or early childhood.

Surely, the Voting Rights Act, *as applied* by the Attorney General and Census in determining the five percent language minorities, cannot be said to be appropriate legislation for the protection of civil rights when different standards are set for the several states. Taken with the other irrationalities indulged in by Census and the Attorney General, the inappropriateness of the Act, *as applied*, is starkly illuminated.

C. *The Irrationality of the Determination of "Citizens of Voting Age" by Census Casts Doubt Upon the Validity of the Voting Rights Act as Applied.*

Several areas of dispute with regard to the determination made by Census have been noted above. The inclusion of disenfranchised voters and nonresident military personnel and students in the citizenship of voting age figure may be explained by the statutory words "citizens of voting age" (all of these questionable included persons may be *citizens* for some purposes). However, the manner of excluding aliens and the ignoring of part of the statutory requirements for inclusion within the Act (the failure to give any effect to the statutory injunction to count the number of citizens registered) present a strong suggestion of administrative irrationality and capriciousness.

According to Census (Appendix 156), the number of citizens of voting age was calculated as follows:

> "The fundamental method used by the Census Bureau in arriving at its determinations of political jurisdictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election involves (a) updating the April 1, 1970, 18 years of age and over population figures to November 1, 1972, (b) subtracting the number of aliens of voting age, and (c) dividing the result by the total number of votes cast in the jurisdiction in the November 1972 presidential election."

Using this formula, Census produced these figures:

Persons of Voting Age in Texas on 11/1/72	7,655,000
Less Aliens of Voting Age in Texas on 11/1/72	140,657
Citizens of Voting Age in Texas on 11/1/72	7,514,343

(Appendix 156.)

The figure for the number of aliens in Texas as of November, 1972, which includes both legal and illegal aliens, is patently erroneous, and in arriving at the number Census ignored the more accurate figures compiled by the Bureau of Immigration and Naturalization, figures which show that there were 263,200 legal aliens in Texas in 1972 (not all of voting age, however) and that 209,912 illegal aliens were deported from Texas in 1972. (Appendix 87, 88; Plaintiffs' Exhibit No. 1.) Plaintiffs' Exhibits 3, 4, and 5 (not admitted but a part of the record on appeal in the court below) further indicated that for every alien apprehended in Texas, at least four times that number were living in Texas and were undetected, approximately 1,000,000 aliens. Use of this figure would have placed Texas without the coverage of the Act (Appendix 87, 88, 156).

This ratio of unapprehended illegal aliens to apprehended illegal aliens, four to one, is borne out by the recent study made under contract to the Bureau of Immigration and Naturalization, denominated as "Final Report - Basic Data and Guidance Required to Implement a Major Illegal Alien Study During Fiscal Year 1976," hereinafter referred to as "Report." (This study was submitted as an Appendix to Appellants' Supplemental Brief, filed in the court of appeals and a part of the record in this Court.)

The Report indicates that there were 2,693,600 illegal Mexican nationals who were undetected in the United States in the year of 1972. (Report, page 12.) Probably one-half of the number were living in Texas, a very plausible figure when consideration is given to the fact that the length of the Texas border lying adjacent to Mexico is in excess of 900 miles while the Mexican

border along New Mexico, Arizona and California is only about 700 miles. *Rand McNally Cosmopolitan World Atlas* (1962 Ed.), pages 80, 82, 107 and 118. Moreover, the larger Mexican population centers lie below the Texas border enhancing the possibility that the major influx of illegal aliens is into Texas.

However, to use overly conservative figures, a reasonable calculation of aliens in Texas in 1972 would be:

Legal aliens:	
263,000 estimated to include only 1/3 persons of voting age or	87,667
Illegal aliens apprehended:	
209,912 of which it may be estimated that 50,000 were apprehended twice, or a figure of	159,912
Illegal aliens not apprehended: 2,693,600 for the United States of which it may be estimated that 1/4 were living in Texas, or a figure of	673,400
Total aliens in Texas by the most cautious estimates	920,979

If this more-than reasonable figure had been used by Census, then the citizens of voting age in Texas in November of 1972 would have been:

Persons of voting age (by Census figures)	7,655,000
Less aliens	920,979
Citizens of voting age	6,734,021

Then, even under the coverage calculations of Census and Justice (which improperly ignored the number of citizens registered to vote), there would have been over fifty-one percent of the citizens of voting age in Texas who voted in the November, 1972, presidential election (3,472,714 persons voting out of 6,734,021 citizens of voting age)--and *Texas would not have been included within the embrace of the Voting Rights Act.*

Appellants do not say the foregoing figures for the number of aliens in Texas are correct (almost certainly there were more aliens than the calculated figure), but the analysis does rather conclusively demonstrate that the figure for aliens used by Census is manifestly ridiculous and constitutes an abrogation of the statutory duty imposed by Congress to "*determine* the *citizens* of voting age" (emphasis added) as a step in the process of determining Voting Rights Act coverage.

And more importantly, the questionable nature of the figures used by Census to trigger the coverage of Texas, emphasizes the need for a hearing of some character.

D. *The Decision by the Attorney General Subjecting Texas to the Voting Rights Act was Erroneous, Irrational and Arbitrary.*

Petitioners have asserted above that the Attorney General erroneously applied the triggering tests of the Voting Rights Act to include Texas within the coverage of the Act by failing to measure the Texas "test or device" (English-only elections) with modifying factors contained in Section 4(d), i.e., the elimination of the continuing effect of such test and the lack of any reasonable probability of recurrences in the future.

Again, with respect to the contention of Texas that

such factors should have been considered before a finding that a "test or device" was used, no hearing was accorded to Texas to urge its no "test or device"theory.

The failure of the Attorney General to hold a hearing before making a determination, which has pitchforked Texas and its political subdivisions into the morass of bureaucratic determinations, purportedly measuring the effect of its statutes and ordinances upon voting, demonstrates the "(in) appropriateness" of the Voting Rights Act, as interpreted, for the protection of civil rights.

Texas, of course, concedes the power of Congress to guarantee civil rights, including the right to vote, by enacting "appropriate legislation." However, here the Attorney General refuses to give fair consideration to a position taken by a state, and legislation which will permit such arbitrariness cannot be said to be "appropriate." As noted by Mr. Justice White (in another voting rights context) in his dissent in *Georgia v. United States*, 411 U.S. 526, 543 (1973),

> "I cannot believe, however, that Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General."

And in the same case, 411 U.S. at 545, Mr. Justice Powell, dissenting, said,

> "As a minimum, assuming the constitutionality of the Act, the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding rather than an ambivalent one."

The executive officials, armed with the administration of the laws, should be acutely aware that

they must perform their duties fairly and cautiously and avoid the slightest tinge of arbitrariness. Otherwise, in the federal-state, federalism context, the legislation will be deemed to be "(in) appropriate."

The determinations by Census and by the Attorney General, in triggering Voting Rights Act coverage of Texas, ignored the law, were unreasonable and cannot form the basis for coverage. And if the law intended such precipitate actions by Census and the Attorney General, the legislation would become "inappropriate" and would be without the power of Congress to enact. *National League of Cities v. Usery*, ___ U.S. ___, 96 S.Ct. 2465 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

Thus, the interpretation and application of the Voting Rights Act by Census and the Attorney General in this case must be held to be improper to save the constitutionality of the Act. Such interpretations and applications cannot have been intended by Congress. Therefore, remand should be ordered by this Court with instructions that Census and the Attorney General perform their statutory duties in a manner consistent with "Our Federalism." *Younger v. Harris, supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be reversed.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that the above and foregoing Brief for the Petitioners has been served on the Defendants-Appellees by hand delivering three copies of said brief on this the ___ day of January, 1977, to: The Solicitor General of the United States, c/o Ms. Cynthia Atwood, Attorney, Department of Justice, Washington, D. C. 20530.

LONNY F. ZWIENER
Assistant Attorney General

No. 76-60

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–40) is reported at 535 F.2d 1259. The oral ruling of the district court (Pet. App. B–1 to B–9) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C–1) was entered on April 19, 1976. The petition for a writ of certiorari was filed on July 16, 1976, and was granted on December 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Director of the Census and the Attorney General properly construed the coverage formula of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94–73, 42 U.S.C. (and Supp. V) 1973b, in determining that the State of Texas is subject to that Section.

STATUTES INVOLVED

Pertinent portions of Section 4 of the Voting Rights Act of 1965, 79 Stat. 438, as amended by Pub. L. 94–73, 89 Stat. 400, 42 U.S.C. (and Supp V.) 1973b, are set forth in the Appendix to the Brief for the Respondents in Opposition (1a–6a).

In addition, 28 U.S.C. 2282, prior to its amendment,[1] provided that:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[1]This section was repealed by Section 2 of Pub. L. 94–381, 90 Stat. 1119, enacted on August 12, 1976. However, Section 7 of Pub. L. 94–381 provides that the repeal "shall not apply to any action commenced on or before the date of enactment." The instant action was commenced by the filing of a complaint on September 8, 1975 (A. 1). See note 10, *infra*.

STATEMENT

A. PROCEDURAL HISTORY

On September 8, 1975, in the District Court for the District of Columbia, petitioners, the Governor and Secretary of State of Texas, instituted this action, pursuant to 28 U.S.C. 1331 and the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, against the Attorney General of the United States, the Director of the Census, and other federal officials. Petitioners sought interlocutory injunctive relief to restrain the defendants from publishing in the Federal Register determinations as to the coverage of Texas under Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94–73, 42 U.S.C. (Supp. V) 1973b, and a "declaratory judgment determining how and under what circumstances the determinations * * * should be made" (A. 10–11). Petitioners contended that the Attorney General and the Director of the Census incorrectly determined that the State of Texas became subject to Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, by virtue of the 1975 amendments thereto.[2]

[2] Section 4, as amended by the Act of August 6, 1975, Pub. L. 94–73, 89 Stat. 400–402, provides that a jurisdiction shall be subject to certain remedial provisions of the Act if the Director of the Census and the Attorney General, respectively, determine that more than five percent of the voting age citizens of the jurisdiction are members of a single language minority, and that the jurisdiction provided any election materials or information only in English as of November 1972; and if the Director of the Census

Petitioners requested that the court declare whether they were entitled to a hearing prior to the determination by the Director of the Census and the Attorney General that the State of Texas was covered by Section 4 of the Act (A. 9); whether the Director of the Census had used inaccurate data in computing the number of citizens of voting age in Texas (A. 7); whether the Director of the Census misconstrued the phrase "citizens of voting age" (*ibid.*); whether the Director had also misconstrued the 50 percent portion of the Section 4 coverage formula (*ibid.*); whether the definition of "test or device" enacted in 1975 could be "retroactively applied" to 1972 (A. 7–9); and, finally, whether the Attorney General had misconstrued Section 4(d) of the Act (A. 9–10).

The complaint did not allege that the challenged provisions were unconstitutional, petitioners did not request that a three-judge district court be convened under 28 U.S.C. 2282, and at the hearing before the district court petitioners stated that they were not making a constitutional argument (A. 99–100; see also A. 112 and note 10, *infra*, p. 12).

Respondents opposed petitioners' motion for a preliminary injunction and moved to dismiss the suit on the ground that the court lacked jurisdiction to review the determinations made under Section 4(b).[3] The single-judge district court granted summary judgment in favor of the respondents,[4] and the court of appeals unanimously affirmed.

determines that less than 50 percent of the citizens of voting age were registered on November 1, 1972, or that less than 50 percent of citizens of voting age voted in the presidential election of 1972.

B. THE FACTS

After Congress enacted Pub. L. 94–73 on August 6, 1975, the Director of the Census and the Attorney General prepared to make the determinations required by Section 4(b) of the Voting Rights Act of 1965, as amended. Between July 14, 1975, and August 28, 1975, the Secretary of State of Texas requested that the Director of the Census and the Attorney General afford the State a hearing prior to the publication of any determinations, to allow the State to present evidence which the Secretary of State alleged was relevant to the question whether Texas should be covered by the Act (A. 20–23, 25–26; Pet. App. A–5). Assistant Attorney General J. Stanley Pottinger notified the Secretary of State that although the statute did not provide for a hearing regarding the determinations, the Bureau of the Census would provide the State with an opportunity to provide data and supporting documentation rele-

[3] Section 4(b) provides in part that:

"A determination or certification of the Attorney General or of the Director of the Census under this section * * * shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

[4] The court, with agreement of all parties, treated respondents' motion to dismiss as a motion for summary judgment (A. 71–72; Pet. App. A–7 and n. 16).

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vant to the Census determinations and that such data would "be received and considered fully and fairly" (A. 13–14; Pet. App. A–5). A meeting was scheduled for September 5, 1975 (A. 79; Pet. App. A–5).[5]

At this meeting, Bureau officials informed the Secretary of State that they would evaluate any evidence presented. Meyer Zitter, Chief of the Population Division of the Bureau of the Census, also informed the Secretary of State that Zitter would "see whether * * * any materials you have * * * would help us decide" and that "there is nothing that we have put out yet that precludes us from making changes * * *." Zitter said that "even if it goes in the Register, if we find that on the basis of evidence that our arithmetic is wrong or there is a better set of data available, we are not precluded from making changes * * *" (A 108–109; Pet. App. A–17 n. 34). However, the Secretary of State presented no facts which the Bureau believed required a change in its tentative determination regarding Texas (A. 159; Pet. App. A–6).

In the district court, Mr. Zitter described by affidavit the methods the Bureau used in making the determination that less than 50 percent of the citizens of voting age in Texas voted in 1972 (A. 156):

[5] On September 4, 1975, the day before the scheduled meeting, the Bureau of the Census issued a press release which "identified five States [including Texas] * * * which fall under the 1975 amendments to the Voting Rights Act * * *" (A. 206). As the press release stated, the Attorney General had not yet made the determination required by section 4(b) as to whether Texas

1. The fundamental method used by the Census Bureau in arriving at its determinations of political jurisdictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election involves (a) updating the April 1, 1970, 18 years of age and over population figures to November 1, 1972, (b) subtracting the number of aliens of voting age, and (c) dividing the result by the total number of votes cast in the jurisdiction in the November 1972 Presidential election. This computation provides the estimated percentage of "citizens of voting age who voted" and is the basis of our determination as to whether less than 50% voted. The votes cast figures used are the official tabulations provided by state governments.

2. Using the above-described formula, the Census Bureau has determined that less than 50% of the citizens of voting age in Texas voted in the November 1972 Presidential election. The figures used in the computation were as follows:

State of Texas:

	Estimates
Voting Age Population as of 11/1/72—	7,655,000
Aliens of Voting Act as of 11/1/72—	140,657
Citizens of Voting Age as of 11/1/72—	7,514,343
Votes Cast as of 11/72—	3,472,714
Percent Citizens of Voting Age Voting—	46.2%

employed a "test or device" in 1972 (A. 207). In addition, the Director of the Census had not yet made his official determination as to coverage. See note 7, *infra*.

The sources of data used to make the Section 4(b) Census determinations were the responses to the 1970 Census Questionnaire, published Census data, and the official number of votes cast in Texas, which was provided to the Bureau of the Census by the State of Texas (A. 156–158).

C. THE DISTRICT COURT'S ORDER

The district court ruled that, despite the clause in Section 4(b) precluding review of the determinations made under that Section, the court had "narrow" jurisdiction to make such inquiry as was necessary "to determine whether or not the interpretation given by the Director of the Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history" (Pet. App. B–4 to B–5).[6]

Applying that standard, the district court ruled that neither the Voting Rights Act nor the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, afforded petitioners the right to an administrative hearing, and that, with regard to each of the issues of statutory construction petitioners raised, the interpretation of the Director of the Census was "rational, consistent with the purposes and meaning of the statute and consistent with the legislative history" (Pet. App. B–5 to B–6), and "must be sustained" (Pet. App. B–7). The court declined to rule on any constitutional issues discussed by petitioners, because it

[6] Petitioners do not here challenge the scope of judicial review applied below.

lacked jurisdiction (Pet. App. B–6), and it refrained from ruling on issues raised regarding the Attorney General's determination under Section 4(b) because the Attorney General had not yet made any determination (*ibid.*).[7]

D. THE DECISION OF THE COURT OF APPEALS

The court of appeals unanimously affirmed. The court ruled first that even where, as here, Congress intended to preclude review of executive actions, "a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority," and that the district court had properly acted within its jurisdiction (Pet. App. A–11 to A–12). The court then reviewed and rejected each of petitioners' contentions.

The court held that, to the extent that petitioners sought to enjoin application of the Voting Rights Act on the ground that a hearing was constitutionally required, the court lacked jurisdiction because injunctive relief on such grounds may be granted only by a three-judge district court, for which petitioners had not applied (Pet. App. A–13). The court noted petitioners' apparent concession that neither the Voting Rights Act nor the Administrative Procedure Act provides for a hearing prior to the making of the

[7] The Attorney General made his determination following the order granting summary judgment in the district court. On September 23, 1975, the Attorney General and the Director of the Census published a joint determination that the State of Texas met the applicable requirements of Section 4(b) of the Act. 40 Fed. Reg. 43746.

determinations under Section 4 (Pet. App. A–12 to A–17), and held that to find such a requirement implied would be contrary to the basic purposes of the Voting Rights Act (Pet. App. A–16). In any event, the court concluded that the Secretary of State's meeting with representatives of the Bureau of the Census afforded Texas "a participation in the decision-making process under the Voting Rights Act greater than the statute requires" (Pet. App. A–17).

The court also ruled that the Director of the Census had not erred in relying on Census data to determine the number of "citizens of voting age" in Texas. The court reasoned that, although petitioners had presented statistics and estimates which might cast "some doubt upon the reliability (in an absolute sense) of the figures used by the Director" (Pet. App. A–21), petitioners had been unable to present better figures. Petitioners'—

> * * * figures are necessarily amalgams of estimates and hypotheses because there are no statistics available which provide what are assuredly completely accurate answers to the questions raised by section 4(b) of the Voting Rights Act. That being so, it is clearly the prerogative of Congress to specify one particular source for all the figures to be used, to insure quick availability and consistency. [Pet. App. A–21.]

The court therefore concluded that the Bureau had properly looked to its own statistics for data, and that, having correctly determined that the statute authorized the Director, "in his discretion, to rely

only on census data," the district court properly refused to review the Bureau's computations themselves (Pet. App. A–23 to A–24).

The court next turned to petitioners' argument that the Director of the Census misinterpreted the portion of Section 4 which requires him to determine whether—

> * * * less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or [whether] less than 50 per centum of such persons voted in the Presidential election of November 1972.

The court noted that the Director of the Census has consistently interpreted the term "such persons" in the second clause to refer to "citizens of voting age" in the first clause (Pet. App. A–24). Petitioners contended that "such persons" refers to "citizens of voting age" "registered" (Pet. App. A–25).[8] The court found petitioners' interpretation of the clause was contrary to the legislative intent, demonstrated by the history of the Act as originally passed in 1965 (Pet. App. A–25 to A–37). For example, the court found that, if petitioners' construction of this provision were correct, "many states that the Act [of 1965] was admittedly aimed at would not have been covered" (Pet. App. 26).

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[8] Under petitioners' construction of this clause, Texas would not be covered by Section 4(b) because in Texas more than half of the voting age population was registered, and more than half of the registered voters voted in the November 1972 election. On the other hand, less than half of the citizens of voting age actually voted in that election. See p. 7, *supra*.

The court also found that the Director's interpretation was supported by the testimony of the Attorney General and the Director of the Census during the Senate hearings in 1965 (Pet. App. A–29 to A–33), and by the remarks of dozens of Senators and Congressmen addressed both to the original Act and to its 1975 amendments (Pet. App. A–34 to A–37 nn. 62–69), and that it is consistent with this Court's application of the provision (Pet. App. A–36; see *South Carolina* v. *Katzenbach,* 383 U.S. 301, 330).

Finally, the court of appeals ruled that Section 4(d) [9] of the Voting Rights Act does not apply to the Attorney General's determination whether a jurisdiction is covered by Section 4. The court ruled that Section 4(d) relates only to the judicial decision, in a suit brought under Section 4(a), whether coverage should be terminated (Pet. App. A–39 to A–40).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents no constitutional attack on the Voting Rights Act amendments of 1975. Indeed, by their choice of forum and by their specific disclaimer

[9] "(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."

in the district court, petitioners have deliberately avoided a constitutional challenge.[10]

Furthermore, petitioners' statutory arguments, although ostensibly directed at the 1975 amendments, are in fact little more than attacks on workaday interpretations of the original Voting Rights Act that have been settled for more than a decade.

Whether inadvertently or not, petitioners articulate these arguments as if they are being advanced for the first time in this litigation, with scant awareness shown for the legislative and judicial interpretations given to the Act since its enactment in 1965. Consequently, there is little if any reasoned argument showing why this Court should, at this late date,

[10] In their petition for a writ of certiorari petitioners presented the question whether "The Voting Rights Act of 1965 as Amended Is * * * Appropriate Legislation to Enforce The Privileges And Immunities Guaranteed By the Fourteenth Amendment" (Pet. 17–28). In our brief in opposition we argued that the courts below correctly held that they lacked jurisdiction to grant injunctive and declaratory relief on constitutional grounds, because petitioners had not sought the convening of a three-judge-court. Therefore, we urged that this Court should not decide the merits of petitioners' constitutional claims.

Petitioners do not present a constitutional claim in their brief on the merits. They state only that (Pet. Br. 17–18):

"Even if Petitioners' Statutory Construction Arguments are Rejected by this Court, the Bureau of Census and the Attorney General of the United States Failed to Follow Their Respective Statutory Duties as Imposed by the Congress of the United States in the Voting Rights Act."

Whatever constitutional claims petitioners may once have had may not properly be raised here. First, constitutional challenges to federal statutes brought prior to August 12, 1976, as this suit

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reverse the settled interpretation of this twice-reenacted remedial legislation.

The Voting Rights Act of 1965 was adopted in response to years of unsuccessful attempts by private litigants and by the federal government to secure the right to vote against discrimination on account of race. The Act provided that certain jurisdictions, to be determined by the operation of a coverage formula contained in Section 4, were to be subject to "a complex scheme of stringent remedies," *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315, aimed at ending that discrimination. These remedies include the suspension of all literacy tests and similar voting qualifications for a period of years, 42 U.S.C. 1973b(a), the suspension of all new voting regulations and procedures pending review by the Attorney

was, were required by 28 U.S.C. 2282 to be heard by a three-judge district court. See p. 2, *supra.* Although 28 U.S.C. 2282 has been repealed by Pub. L. 94–381, the repealer statute explicitly provided that "[t]his Act shall not apply to any action commenced on or before the date of enactment." To the extent that any constitutional issues were raised below, the courts below therefore properly declined to decide them (Pet. App. B–2; A–13 and n. 29), and this Court should do so as well.

Second, not only did petitioners not allege a constitutional violation or request the convening of a three-judge court, they waived any constitutional claims they may initially have asserted. In the hearing in the district court the following colloquy occurred (A. 99):

"The COURT: * * * You have those rights under the statute which you can exercise.

"Mr. ZWEINER [Counsel for petitioners]: That is true but we say that Congress, in passing the statute, must have intended for the representatives that it chose to enforce the statute to have acted on a rational basis and that these particular standards that I have just discussed are a part of that rational basis decision making

General or a three-judge district court in the District of Columbia, 42 U.S.C. 1973c, and the assignment of federal examiners on certification by the Attorney General to list qualified applicants who then become eligible to vote in all elections, 42 U.S.C. 1973d and 1973e.

These remedies applied, in 1965, to any state or political subdivision (1) which the Attorney General determined maintained a "test or device" within the meaning of the Act on November 1, 1964,[11] and (2) in

determination that must be made. Otherwise, the statute would be unconstitutional.

"The COURT: If you have got a constitutional argument, the statute requires you to ask for a three-judge court; and you haven't done so.

"Mr. ZWEINER: I am not making that argument."

The district court noted in its oral opinion, issued on the day of the hearing, that (Pet. App. B–2):

"The issues are in one respect narrow in that this is a single-judge Court and there is no question as to the constitutionality of the statute presented or indeed attempted to be presented in these proceedings."

Because of the bar to consideration of constitutional claims and because petitioners apparently have abandoned the constitutional claims they raised in their petition, we do not address the substance of those claims here, other than to note that the constitutionality of Section 4 is firmly established, *South Carolina* v. *Katzenbach*, 383 U.S. 301, and that the legislative record provides ample justification for the 1975 expansion of the Act. See *e.g.*, "Constitutionality of proposed expansion of the Voting Rights Act," Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 1043 (1975).

[11] The 1965 Act defined "test or device" to mean any requirement that a registrant or voter—

"(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral

which the Director of the Census determined that less than 50 percent of its voting age residents were registered to vote on November 1, 1964, or voted in the presidential election of November 1964. 42 U.S.C. 1973b(b). Section 4 of the 1965 Act further provided that the determinations of the Attorney General and the Director of the Census were not reviewable in any court (*ibid.*).

Although no pre-determination hearing was provided, and although review of the coverage determination itself was prohibited, the Act provided a means by which a jurisdiction, once covered, could terminate such coverage. Under Section 4(a), a jurisdiction could "bail out" from coverage by bringing suit, at any time, in the District Court for the District of Columbia and proving that the jurisdiction had not maintained any test or device with a discriminatory purpose or effect for five years prior to the suit. 42 U.S.C. 1973b(a).

The structure of the 1965 Act thus conformed to its purposes. The determinations of the Attorney General and the Director of the Census subjected the jurisdiction to the remedial requirements of the Act without delay,[12] while the adjudication whether or not

character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C. 1973b(c). The 1975 amendments expanded this definition. See text at note 14, *infra*.

[12] The Voting Rights Act of 1965 was signed into law on August 6, 1965. On August 7, 1965, Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 26 counties in North Carolina and one county in Arizona were determined to be covered by the Act. 30 Fed. Reg. 9897.

such jurisdiction had engaged in discriminatory use of tests or devices awaited a termination suit. As this Court noted in upholding the constitutionality of Section 4, the Act was designed "to shift the advantage of time and inertia from the perpetrators of the evil to its victims" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328).

In 1970 Congress extended the provisions of the Voting Rights Act (including Sections 4 and 5) for another five years. Application of the Section 4 formula to the 1968 presidential election brought additional jurisdictions within the Act's coverage.[13] In 1975 Congress once again extended the provisions. Pub. L. 94–73. In addition, Congress expanded the definition of "test or device" to include—

> * * * any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.[14]

The coverage formula in Section 4 was updated to include jurisdictions: (1) which the Attorney General

[13] See S. Rep. No. 94–295, 94th Cong., 1st Sess., App. B, p. 65 (1975).

[14] 42 U.S.C. (Supp. V) 1973b(f)(3). "Language minority" is defined to mean persons who are American Indians, Asian Americans, Alaskan Natives, or of Spanish heritage. 42 U.S.C. (Supp. V) 1973*l*(c)(3).

determined had maintained a test or device on November 1, 1972, and (2) in which the Director of the Census determined that less than fifty percent of the citizens of voting age were registered or voted in the presidential election of November 1972. The new definition of "test or device" to include English-only voting materials and the updating of the coverage formula to include the 1972 presidential election brought Texas (and other jurisdictions) within the Act for the first time. Such jurisdictions became subject to the remedial provisions of the Act previously described. See p. 15, *supra*.

In support of the expansion of coverage of the Act, Congress had before it extensive evidence of discrimination in voting against persons of Spanish heritage as well as blacks, particularly in the State of Texas.[15] For example, the House Report notes that:

> In 13 days of hearings and testimony from 34 witnesses, the Subcommittee documented a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English.
>
> * * * * *
>
> The State of Texas, for example, has a substantial minority population, comprised pri-

[15] The district court noted that "Texas is on almost every page of the legislative history" (A. 80). At least seven witnesses before the Subcommittee on Civil and Constitutional Rights of the House of Representatives Committee on the Judiciary testified regarding voting discrimination in Texas. See Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess. (1975). See also, Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975).

> marily of Mexican Americans and blacks. Evidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South.
>
> Turnout in recent presidential elections in Texas (1960–1972) has been consistently below 50 percent of the voting age population. Indeed, the only reason that Texas was not covered by the Voting Rights Act in 1965 or by the 1970 amendments was that it employed restrictive devices other than a formal literacy requirement.
>
> * * * * *
>
> The exclusion of language minority citizens is further aggravated by acts of physical, economic, and political intimidation when these citizens do attempt to exercise the franchise. Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican American voting precincts, and harass and intimidate Mexican American voters.
>
> Much more common, however, are economic reprisals against minority political activity. Fear of job loss is a major deterrent to the political participation of language minorities. A witness from Texas indicated that an Anglo candidate who was a loan officer at the bank went to each Mexican American who had loans with the bank and told them he expected their

votes. The Subcommittee record is replete with overt economic intimidation designed to interfere with and abridge the rights of Mexican American voters. [H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 16-18 (1975) (citations omitted).]

The House Report concluded that—

[t]he failure of states and local jurisdictions to provide adequate bilingual registration and election materials and assistance undermines the voting rights of non-English-speaking citizens and effectively excludes otherwise qualified voters from participating in elections. [*Id.* at 22.]

The Senate Committee found similar evidence of discrimination and reached similar conclusions.[16] See S. Rep. No. 94-295, 94th Cong., 1st Sess. 25-26, 30 (1975). Congress, following the precedent of the 1965 Act, therefore brought under the special provisions of the Act those States and political subdivisions with low voter participation that had maintained the type of test or device which had played a substantial role in disenfranchising Mexican-Americans, Puerto Ricans and Native Americans—the use of voting materials

[16] Cf. *Graves* v. *Barnes*, 343 F. Supp. 704, 729 (W.D. Tex.), affirmed in relevant part *sub nom. White* v. *Regester*, 412 U.S. 755:

"Because of long-standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others."

which non-English speaking citizens could not understand.

We show in this brief that each of the challenged actions taken by the Director of the Census and the Attorney General was proper. First, there is no provision, express or implied, in the Voting Rights Act, the Administrative Procedure Act, or any other statute, which gave petitioners the right to a hearing prior to the determinations by the Attorney General and the Director of the Bureau of the Census that Texas was subject to the Voting Rights Act. Second, the Director of the Census properly determined the number of citizens of voting age in Texas based on census data available at the time of that decision; his determination is, in any event, not subject to judicial review.

Third, the Director correctly construed the Act to require coverage if less than 50 percent of the citizens of voting age actually voted in 1972; petitioners' contention that coverage depends on a determination that less than 50 percent of the registered voters actually voted is contrary to the explicit legislative history on the point and to this Court's repeated interpretation of the coverage formula. Finally, the Attorney General was required merely to determine whether Texas employed a "test or device" in 1972; he was not required to determine whether such a test or device was employed with discriminatory purpose or effect. Petitioners' contention that there was no discriminatory purpose or effect in English-language elections is relevant only in an action brought in the District Court

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for the District of Columbia under Section 4(d) of the Act to terminate coverage.

In sum, the Director of the Census and the Attorney General have correctly construed the coverage provisions of Section 4 contained in the 1975 expansion of the Voting Rights Act, and have properly implemented the congressional intent that Texas be covered.

ARGUMENT

THE DIRECTOR OF THE CENSUS AND THE ATTORNEY GENERAL PROPERLY CONSTRUED THE COVERAGE FORMULA OF SECTION 4 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY PUB. L. 94–73, 42 U.S.C. (AND SUPP. V) 1973B, IN DETERMINING THAT THE STATE OF TEXAS IS SUBJECT TO THAT SECTION

Though petitioners in form attack the 1975 amendments to the Voting Rights Act of 1965, these amendments merely brought Texas under the coverage of the original Act. They did so by expanding the definition of "test or device" to include the use of English-only voting materials in those jurisdictions which have a single-language minority greater than five percent. Petitioners do not challenge the inclusion of English-only elections as a "test or device," and they concede that Spanish-speaking citizens of voting age in Texas exceed five percent of the State's voting age population. Moreover, they admit that as of November 1, 1972—the pertinent date for determining coverage under the 1975 amendments—Texas conducted its elections only in the English language (Pet. 4–5).

The thrust of petitioners' arguments, therefore, is not really directed to the 1975 amendments, but rather to

provisions of the original Voting Rights Act—petitioners discuss the construction of the "50 percent clause" and argue that the Attorney General and the Director of the Census must afford the State a hearing prior to determining whether it is covered by the Act, and that the Attorney General must find, as a prerequisite to coverage, that a state used a test or device with discriminatory purpose or effect.

Nothing in the 1975 amendments or their legislative history suggests any reason why these basic features of the Act should now be interpreted or applied any differently than they have been throughout the Act's 11-year history. Indeed, precisely the contrary conclusion is indicated by Congress' reenactment and expansion of the Act. And, significantly, in extending the Act in 1970 and again in 1975, Congress repeatedly relied on and indicated approval of this Court's decisions construing the Act.[17]

The fundamental purpose behind the structure of Section 4 was to shift from private individuals to the covered jurisdictions the burden of litigating the abridgment of the right to vote on account of race. As the Court explained in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 327–328:

> Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: the measure prescribes remedies for

[17] See H.R. Rep. No. 397, 91st Cong., 1st Sess. 2–8 (1969); S. Rep. No. 94–295, 94th Cong., 1st Sess. 15–16, 22–24, 34–37 (1975); H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 8–9, 13–15, 26, 28–29, 32–33 (1975).

voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung,* 379 U.S. 294, 302–304; *United States* v. *Darby,* 312 U.S. 100, 120–121. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Section 4(b) of the Voting Rights Act of 1965 is central to the congressional scheme for avoiding delay in enforcement and shifting the burden to covered jurisdictions. In addition to establishing coverage criteria and mechanisms, that subsection provides:

> A determination or certification of the Attorney General or of the Director of the Census under this section * * * shall not be reviewable in any court * * *.[18]

Although the courts below held that this provision did not divest them of "narrow" jurisdiction to determine whether the Executive defendants applied the law in a manner consistent with the statutory language and

[18] This clause was held constitutional in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332–333.

congressional intent, both courts emphasized that their jurisdiction was sharply limited.[19]

The courts below correctly ruled that the federal parties had interpreted Section 4 of the Voting Rights Act in a manner which comported with the plain meaning of the statute, with the legislative history, and with the relevant case law (approved by Congress in twice extending the Act).[20]

A. TEXAS IS NOT ENTITLED TO A HEARING BEFORE THE DIRECTOR OF THE CENSUS AND THE ATTORNEY GENERAL REGARDING THE DETERMINATIONS MADE UNDER SECTION 4(B) OF THE VOTING RIGHTS ACT

Petitioners argue that they are entitled to some form of an administrative hearing prior to being subjected to coverage under the Voting Rights Act (Pet.

[19] The district court noted that (Pet. App. B–4, B–7):

"This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.

* * * * *

"There are protections in the Act. The Attorney General must bring enforcement proceedings where defenses are available. There is also under certain circumstances available remedies under the so-called bail-out provisions of the statute. But the first step is a step that a court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained."

The court of appeals affirmed this interpretation of the court's jurisdictional authority (Pet. App. A–12; A–22 to A–24). Both courts also noted their lack of jurisdiction to rule on any constitutional issues (Pet. App. B–2, A–13). See note 10, *supra*.

[20] A similar issue, as to Section 5 of the Act, is presented in *Morris* v. *Gressette*, No. 75–1583, probable jurisdiction noted December 6, 1976.

Br. 18–21). However, petitioners cite no statutory or regulatory authority to support the proposition. The Voting Rights Act itself imposes no such requirement, and, as both courts below noted, the Administrative Procedure Act does not afford a hearing under these circumstances.[21] Petitioners do not dispute either of these conclusions. Nor does anything in the legislative history of the Voting Rights Act suggest that Congress intended jurisdictions potentially subject to the coverage formula of Section 4 to be afforded a hearing (see Pet. App. A–14 to A–15).

Moreover, as the court of appeals stated, a right to an administrative hearing regarding application of the coverage formula of Section 4 would be so inconsistent with the purposes of the Act "as to compel the conclusion that a predetermination hearing cannot be implied from the terms of the statute" (Pet. App. A–15 to A–16). As previously noted, the determinations of the Director of the Census and the Attorney General serve to screen out initially from the coverage of the special provisions of the Act those states and

[21] See Pet. App. B–5. The court of appeals held (Pet. App. A–12 to A–13 n. 28) that—

"* * * it appears that the type of "hearing" [petitioners] seek is the trial-type hearing detailed by sections 7 and 8 of the APA, 5 U.S.C. §§ 556, 557 (1970), which includes an opportunity to cross-examine and to know and meet the opposing evidence. A trial-type hearing before an agency is most appropriate where, as here, there are disputed issues of fact to be resolved. * * *

"Hearings under sections 7 and 8 however, are required *only* when either rulemaking or adjudications are required by statute to be 'on the record after opportunity for an agency hearing,' 5 U.S.C. §§ 553, 554 (1970). The Voting Rights Act contains no such requirement."

political subdivisions where a pattern of voting discrimination is not suggested by the statistics and by the past use of a test or device. Petitioners argue that "some opportunity to demonstrate noncoverage" and "[s]ome means * * * to challenge the interpretations of the Act" must be provided for this purpose (Pet. Br. 20). In fact, an opportunity for a hearing is provided, but, in order to assure prompt vindication of voting rights, it follows, rather than precedes, the administrative determinations of the Attorney General and the Director of the Census.

Congress in Section 4(a) provided for a post-determination judicial hearing in which any state or subdivision can seek to terminate coverage under the Act by showing that it has not used a test or device with discriminatory purpose or effect. It is true that such a hearing puts the burden of proving nondiscrimination on the state. But this Court has ruled this burden "quite bearable," considering that the state need only submit affidavits of nondiscrimination and then "refute whatever evidence to the contrary may be adduced by the Federal Government," and that the relevant evidence of discrimination is "peculiarly within the knowledge of the States and political subdivisions themselves." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 332.[22] It is the means chosen by Con-

[22] Thus far 3 states and 21 political subdivisions have been determined to be covered under the 1975 amendments to Section 4 of the Voting Rights Act. 40 Fed. Reg. 43746, 49422; 41 Fed. Reg. 783, 34329. Three of those political subdivisions have since terminated coverage. *State of New Mexico* v. *United States*, D.D.C., Civil Action No. 75–2125, decided September 17, 1976.

gress "to shift the advantage of time and inertia" (*id.* at 328) to the victims of voting discrimination.

Moreover, as the record below demonstrates, and as petitioners concede, the Secretary of State of Texas was invited to meet with officials of the Census Bureau, and to present evidence regarding the coverage of Texas under Section 4 (see pp. 5–6, *supra*). As the court of appeals concluded, "the State of Texas was afforded a participation in the decision-making process under the Voting Rights Act greater then the statute requires" (Pet. App. A–17).

B. THE DIRECTOR OF THE CENSUS PROPERLY CONSTRUED SECTION 4(B) IN DETERMINING THE NUMBER OF CITIZENS OF VOTING AGE IN TEXAS

Section 4(b) of the amended Voting Rights Act requires, as one condition to coverage, that the Director of the Census determine that "less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of 1972." Petitioners claim that the Director of the Census used inaccurate data in counting the number of aliens in Texas and as a result erroneously concluded that Texas fell within the mathematical coverage formula of Section 4 (Pet. Br. 22–26). However, the Director used the data Congress intended him to use—the census figures—which are much more reliable than the conjectures presented by the petitioners (see *e.g.*, Pet. Br. 25).

Petitioners argue that "the manner of excluding aliens" from the gross "persons of voting age" figures "present[s] a strong suggestion of administrative irrationality and capriciousness" (Pet. Br. 23). From that premise petitioners ask this Court to do precisely what Congress in Section 4(b) has forbidden this or any other court to do—"to review * * * objective statistical determinations" by the Census Bureau. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 332–333. This Court there upheld the Act's limitation of judicial review against South Carolina's argument that it would allow arbitrary imposition of the Act's provisions, and petitioners' guesses, estimates and possibilities as to population show the wisdom of Congress in prohibiting judicial review of Census figures in this context.

Even meeting petitioners on their own terms, however, they have fallen far short of showing the invalidity of the Director's determinations. In order to make the required determination with regard to Texas, the Census Bureau updated to November 1, 1972 the 1970 census figures for the population 18 years of age and over [23] and then subtracted from that

[23] As Congress knew (see, *e.g.* 121 Cong. Rec. H4889 (daily ed., June 4, 1975)) (Remarks of Cong. Badillo, a sponsor of the 1975 amendments), it is impossible for anyone to count in 1975 the precise number of persons who were in a jurisdiction in 1972. It is therefore necessary to use estimates. The number of persons in the State of Texas 18 years of age and over in 1970 was derived by tabulation of data contained in Questions 5–7 of the U.S. Census Questionnaire, which records the age of every person in each house-

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figure the number of persons counted in the Census who were aliens of voting age.[24] It then divided the total number of 1972 votes cast in Texas by this figure, which gave a percentage of 46.2 (A. 156).[25]

Petitioners argue that the Director of the Census mistakenly undercounted or underestimated many aliens residing in Texas, and that therefore the 140,657 aliens of voting age the Director excluded from his total count of persons of voting age [26] is unreasonably low, making the figure arrived at for citizens of voting age too high (Pet. Br. 23–26). Petitioners conclude that had the Director of the Census used more accurate data regarding aliens, Texas would not have

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hold (A. 156–1f7). Estimates of the November 1, 1972 population were made by interpolating between estimates of the July 1, 1972 and July 1, 1973 population. The latter estimates were derived by averaging the results of two statistical methods which use current data to estimate change in the total population. These standard Census Bureau procedures are explained in detail in United States Bureau of the Census, Current Population Reports, P–25, No. 520, "Estimates of the Population of States with Components of Change, 1970 to 1973," July 1974, pp. 7–17 (A. 181–191).

Estimates of the November 1, 1972, population under 18 years of age were computed in a manner consistent with the estimate of total population and then subtracted from the total population estimates to obtain the voting age population estimates (A. 157).

[24] The alien population in Texas was derived from the 1970 census by combining the results of Questions 13a ("where was this person born") and 16a ("for persons born in a foreign country—is this person naturalized?") in the 5 percent sample forms of the April 1970 Census Questionnaire (A. 157). In other words, those persons who, in responding to the Census Questionnaire, identified themselves as aliens were so counted for purposes of subtracting aliens from the total voting age population.

[25] For table, see p. 7, *supra*.

[26] See p. 7, *supra*.

been covered by Section 4 because it would have been determined that more than 50 percent of the citizens of voting age voted in 1972 (Pet. Br. 26). Both courts below correctly rejected this argument.

In the first place, petitioners miss the point when they argue that the Director of the Census erroneously ignored estimates of the Immigration and Naturalization Service which, petitioners assert, would place Texas outside the formula of Section 4 coverage if used in place of the Census' estimates (Pet. Br. 24–26). In ordering the Director of the Census to determine whether less than 50 percent of the citizens of voting age in Texas voted in November 1972, Congress entrusted to the Director the discretion to rely on the data available to him. As the court of appeals noted (Pet. App. A–21), Congress chose "to specify one particular source for all the figures to be used, to insure quick availability and consistency." Petitioners cite no legislative history to the contrary, and there is ample historical indication that the court's conclusion was intended by Congress—and, indeed, that Congress was itself looking to Census data in anticipating that Texas would be covered by the 1975 amendments. H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 20 n. 22, 22 nn. 30–32, 23, 30 nn. 44–45 (1975); S. Rep. No. 94–295, 94th Cong., 1st Sess. 24 n. 14, 28 n. 18, 30 nn. 26–28, 31, 38 (1975).

Congress debated in 1965 whether to use Census figures for the purpose of the coverage formula in Section 4(b). During the Senate hearings on the 1965 Act, use of Civil Rights Commission figures was con-

sidered and rejected. See Hearings on S. 1564, "Voting Rights," before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., part 1, 596 (1965). Supporters of the Voting Rights Act supported the use of census figures as the "best available." 111 Cong. Rec. 11470 (1965) (remarks of Senator Tydings). Senator Mansfield stated (111 Cong. Rec. 8298 (1965)):

> Inasmuch as we appropriate money every so often to the Census Bureau for the taking of the census, I believe we much have some faith in the credibility of the Census Bureau. If not, we are wasting money in maintaining that division of the Government.

In any event, petitioners' unpersuasive attempts to demonstrate that there are other, more reliable, estimates of the number of aliens in Texas in 1972 lend support to, rather than undermine, the decision of the Director of the Census to rely upon the data gathered by the Census itself.

Before addressing the specific difficulties with petitioners' figures, it is necessary to put the issue in perspective. Undoubtedly there were some illegal aliens in Texas who did not step forward to be counted in the 1970 Census. Whether there were one hundred or one million such aliens, however, is wholly irrelevant. Each one counted would have increased both the "voting age population" figure and the "aliens of voting age" figure by one. When the latter figure is subtracted from the former, the resulting "citizens of voting

age"—the critical figure for Section 4 purposes—would still be 7,514,343 and thus the voting participation would still be 46.2 percent. The same result holds for untabulated legal aliens. Therefore, the number of aliens the Census may have missed in 1970 has no effect whatever on the conclusion that only 46.2 percent of citizens of voting age actually voted in 1972.

Petitioners could impeach the validity of the Director's conclusion—if they had a right under the Voting Rights Act to do so, which they do not—only by showing that some of the 7,514,343 "citizens" counted by the Census are actually aliens. Furthermore, petitioners would have to show that the Census misidentified at least 568,915 aliens as citizens;[27] otherwise the percentage of citizens of voting age voting would still be less than 50 percent and Texas would still be covered by the Act.

Petitioners begin this argument by asserting that "209,912 illegal aliens were *deported*[28] from Texas in 1972" (Pet. Br. 24) (emphasis added). However, as the court of appeals noted, the source relied upon by petitioners shows no such figure; it does show that "only 16,266 aliens were deported from the *entire* United States during the year ending June 30, 1972"

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[27] There were 3,472,714 votes cast in 1972. That figure is 50 percent of 6,945,428. There were, according to the Census, 7,514,343 citizens of voting age in 1972. The difference between the two latter figures is 568,915.

[28] In the calculations on p. 25 of their brief, petitioners indicate that the 209,912 figure represents illegal aliens apprehended. However, no source for this figure or its characterization is given beyond that discussed in the text.

(Pet. App. A–19 n. 40). The court of appeals also criticized the 209,912 figure because (Pet. App. A–19).

> * * * there is no indication of how many of these [deported aliens] were of voting age; nor is there any correction made for individuals who might have been deported two or more times; nor does this tell us how many were residing in the state on November 1, 1972.

Petitioners have attempted to respond to the court's second concern by subtracting 50,000 "which it may be estimated * * * were apprehended twice" (Pet. Br. 25) from the 209,912 "illegal aliens apprehended" (*ibid.*). However, petitioners make no attempt to explain how they reached their estimate of 50,000, and give no source for that number.

Next, petitioners conclude that 673,400 unapprehended illegal aliens were living in Texas in 1972. In coming to that figure they start with the estimate that there were 2,693,600 "illegal Mexican nationals who went undetected in the United States in the year 1972" (Pet. Br. 24). That is the estimate reached in a study published on October 15, 1975, which, as the court of appeals noted, was after the date upon which the Director of the Census published his determinations regarding Texas (Pet. App. A–20). Although petitioners without source citation or other explanation estimate that one fourth of this estimate, or 673,400 Mexican nationals were living in Texas in 1972, they do not indicate the age of these persons and fail to tell the number who resided in the State on November 1, 1972. Thus, petitioners' "more-than-

reasonable" alternative to the Director's computation of the number of citizens of voting age residing in Texas on November 1, 1972, is nothing more than a chain of unsupported guesses and estimates of estimates, strung together from a variety of sources, named and unnamed.[29] Faced with such an alternative, it is not surprising that the Director of the Census chose to rely upon his own estimates—as Congress intended that he would.[30]

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[29] Petitioners argue that 920,979 (their estimate of the number of aliens residing in Texas in 1972) should be subtracted from the Census Bureau's count of 7,655,000 persons of voting age residing in Texas on November 1, 1972, rather than the 140,657 which the Director of the Census subtracted (Pet. Br. 25). Petitioners apparently assume (Pet. Br. 24–25) that most aliens in Texas are of Spanish heritage. Thus, if petitioners' arithmetic is to be used, the Director of the Census improperly counted 780,322 (920,979 minus 140,657) aliens of Spanish heritage as citizens. The Director of the Census has determined, pursuant to his duties under Section 4(b) of the Act, that in 1972 there were 860,553 citizens of Spanish heritage of voting age in Texas. If petitioners' proposed estimates were correct, then more than 90 percent of all persons of Spanish heritage and of voting age in Texas in 1972 were aliens. Such a result strains credulity; the courts below understated the matter in holding that petitioners had failed to support their contention (Pet. App. A–21). In addition, even if petitioners' conjectures as to the number of illegal aliens in Texas were assumed to be correct, it would then be just as logical—and more credible—to assume that the total voting age population figure for Texas (7,655,000) was also understated.

[30] As the court of appeals noted, "[t]he efforts by appellants to correct the source figures to meet some of the criticisms made above—*e.g.*, that certain statistics do not take into account the possibility that some aliens might have been deported more than once—only compound the uncertainties in the final figure" (Pet. App. A–21).

In light of the foregoing, there is no reason to conclude that the Director of the Census acted irrationally or capriciously in relying upon Census data in making the determinations required of him by the Voting Rights Act.

C. THE DIRECTOR OF THE CENSUS CORRECTLY DETERMINED THAT LESS THAN 50 PERCENT OF THE CITIZENS OF VOTING AGE IN TEXAS VOTED IN 1972

Petitioners also challenge (Pet. Br. 8–13) the Director of the Census' interpretation of the portion of Section 4 which requires him to determine, as a condition of coverage,

> * * * that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per-centum of such persons voted in the Presidential election of November 1972.

The Director of the Census has consistently interpreted the term "such persons" in the second clause to refer back to "citizens of voting age" in the first clause. Under this construction of that provision and similar portions of Section 4, a state comes within the voting-participation aspect of the coverage formula if either of two conditions is met: (1) less than half its total citizens of voting age were registered, or (2) less than half of its total citizens of voting age voted (Pet. App. A–24).

Petitioners contend (Pet. Br. 9) that this construction makes the first clause meaningless, because no jurisdiction could ever be covered by the first clause

without being covered by the second (at least where registration is a mandatory prerequisite for voting). They urge therefore that the second clause refers not to less than half the state's voting age citizens voting, but to less than half the state's registered voters voting.

Whatever force this contention might have as a purely textual argument,[31] it must yield in the face of uncontroverted legislative history and unanimous interpretation of the coverage formula by this Court, which conclusively demonstrate that the Director's interpretation is correct.

1. Legislative history of the 1965 Act

The Voting Rights Act coverage formula proposed by the Johnson Administration and adopted in 1965 is very similar to the one which was adopted in 1975. Senator Edward M. Kennedy questioned Attorney General Katzenbach [32] during the 1965 Senate hearings

[31] In testimony before the Senate in 1965, however, A. Ross Eckler, then Acting Director of the Census, testified that, under his interpretion, "it is not necessary for us to undertake the assembly of information on registration." Subsequently, Senator Ervin said, "So we might as well for all practical purposes strike that provision out of the act" (Pet. App. A–30, A–32 to A–33).

[32] In construing the Voting Rights Act, this Court has often looked to Attorney General Katzenbach's testimony for authoritative guidance as to legislative intent. See, *e.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 n. 31, 567–568; *Gaston County* v. *United States*, 395 U.S. 285, 289–290; *Perkins* v. *Matthews*, 400 U.S. 379, 387–388 and n. 7; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75–104, decided March 1, 1977, slip op. 12–13.

regarding the meaning of "such persons" in the coverage formula, as follows (Hearings on S. 1564, "Voting Rights," before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., part 1, 162 (1965)):

> Senator KENNEDY. Touching on an area where there might be some ambiguity, section 3(a)(2) states that the Director of Census is to determine "that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964." Pertaining to the last clause of that language * * * does the term "such persons," refer to people in the State who were registered to vote, or people in the State of voting age?
>
> Attorney General KATZENBACH. Persons in the State of voting age residing therein, Senator, not those registered. Presumably, normally, people have to be registered to vote. But the reference here would be simply to persons residing therein of voting age.

This construction is also indicated by the testimony, which the court below quoted at length (Pet. App. A–29 to A–33), of A. Ross Eckler, Acting Director of the Census, Hearings on S. 1564, *supra*, at 599–601. The trigger formula was given the same interpretation on the floor of the Senate (111 Cong. Rec. 11079 (1965)) (remarks of Sen. Eastland):

> Because it seems unlikely, if not impossible, that a person could vote in the November 1964 presidential election who was not registered on November 1, 1964, for practical purposes, the criterion is that a State will have its voter qualification tests suspended if * * * less than half of them voted in the 1964 presidential election.

As the court of appeals further noted, many Senators and Congressmen, throughout the debates on the 1965 Act, interpreted the coverage formula in the same manner (Pet. App. A–35 n. 65).

Moreover, as the court below indicated (Pet. App. A–26 and n. 54), if petitioners' interpretation of this provision had been employed in 1965, many states that the Act was specifically intended to reach would have been excluded from coverage.[35] In addition, under petitioners' proposed construction, a jurisdiction in which 50 percent of the citizens of voting age were registered, and in which 50 percent of the registered voters voted—*i.e.*, 75 percent of the citizens of voting age did *not* vote—would not be covered by the Act.

2. Interpretation by this Court

The Director's interpretation of this portion of the coverage formula is also the settled interpretation by this Court of the formula.

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[35] Petitioners' proposed construction would have excluded the States of Georgia, Louisiana, and South Carolina from the coverage of the Act. This Court explicitly noted the Congress' contrary intention with respect to these three States (*South Carolina* v. *Katzenbach*, *supra*, 385 U.S. at 330). As the court of appeals stated, "[s]imilarly, the Congress clearly contemplated that Texas would be covered by the 1975 Amendments" (Pet. App. A–26 to A–27 and n. 54).

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 317 the Court stated that—

> * * * the Director of the Census has determined that less than 50% of [South Carolina's] voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964.

This Court used similar language in *Gaston County* v. *United States,* 395 U.S. 285, 286:

> The Voting Rights Act of 1965 suspends the use of any test or device as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presidential election.

In *Georgia* v. *United States,* 411 U.S. 526, 528 n. 1, this Court defined "Covered States" as "those in which less than 50% of eligible voters were registered to vote or actually voted." And, as recently as this Term, the Court noted that certain counties in New York were covered by the Act by virtue of the Director's determination that "fewer than 50% of the voting-age residents of these three counties voted in the presidential elections of 1968." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 2.

3. 1975 Legislative history

Finally, this interpretation of the coverage formula was specifically reapproved in the course of the adoption of the 1975 amendments. As Congressman Badillo explained (121 Cong. Rec. H4737 (daily ed., June 2, 1975)):

> We sought to maintain precisely the same structure that presently exists in the act, and that is the reason that in title II the trigger mechanism that is retained is identical to the mechanism in the 1965 act. That is the principle that the jurisdictions to be covered will be those where less than 50 percent of the persons of voting age were registered to vote or actually voted.[34]

See also S. Rep. No. 94–295, 94th Cong., 1st Sess. 46, 66(1975); H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 62–63(1975).

The legislative history and this Court's decisions thus specifically refute petitioner's argument on this point.[35]

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[34] "Persons" was later changed to "citizens". See 121 Cong. Rec. H4884–4893 (daily ed., June 4, 1975).

[35] Petitioners also argue (Pet. Br. 21–22) that the Director of the Census arbitrarily defined "persons of Spanish heritage" in determining that greater than 5 percent of the citizens of voting age in Texas "are members of a single language minority." 42 U.S.C. (Supp. v) 1973b(b), 1973*l*(c)(1). Although petitioners raised this issue in the district court (A. 136–137), they did not raise it in the court of appeals and that court, noting petitioners' failure to raise the issue, expressed no opinion on it (Pet. App. A–17 n. 36). Nor did petitioners mention the issue in their petition. Therefore it is not appropriately raised at this stage of the proceedings. In any event, the definition of "Spanish heritage" employed by the Director of the Census is precisely that which Congress intended the Director to use. See S. Rep. No. 94–295, 94th Cong., 1st Sess. 24(1975); 121 Cong. Rec. H4716 (daily ed., June 2, 1975) (remarks of Cong. Edwards); 121 Cong. Rec. S13407 (daily ed., July 23, 1975) (remarks of Sen. Tunney).

D. THE ATTORNEY GENERAL PROPERLY REFUSED TO CONSIDER SECTION 4(d) OF THE VOTING RIGHTS ACT WHEN MAKING HIS SECTION 4(b) DETERMINATIONS

Petitioners argue (Pet. Br. 13–17) that the Attorney General erred in refusing to apply Section 4(d) of the Voting Rights Act when making his determination that the State of Texas is covered by Section 4. Petitioners have quoted Section 4(d) out of context (Pet. Br. 14–15), and fail to show that it is to be applied in the manner they suggest.

Section 4(d) of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973(d), provides in full that (emphasis supplied):

> (d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices *for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (f)(2)* of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

Petitioners argue, contrary to the plain meaning of the Section and its legislative history, that the Attorney General must determine whether Section 4(d) is applicable to the State of Texas prior to his

making the determination required by Section 4(b) that the State has employed a "test or device."

For purposes of making his determination as to coverage under Section 4(b), however, the Attorney General is required only to determine whether a test or device within the meaning of the Act existed at a particular time in a particular jurisdiction. Section 4(d) does not require, for purposes of the Attorney General's determination, that he evaluate a particular test or device to determine whether it has had a discriminatory purpose or effect. Rather he is to engage in "a routine analysis of state statutes," *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 301, and in the case of the 1975 amendments, election procedures and materials, to determine if they constitute a test or device.

Section 4(d) is applicable only to a suit brought by a jurisdiction covered by Section 4 to *terminate* such coverage. Section 4(a) in pertinent part provides that a jurisdiction covered by Section 4 can seek termination of coverage by bringing suit for a declaratory judgment in the United States District Court for the District of Columbia and proving that it has not used a test or device as defined by the Act for a stated period of time with the purpose or the effect of denying or abridging the right to vote on account of race or color or on account of membership in a language minority group. It is only at this point that Section 4(d) becomes relevant. In

South Carolina v. *Katzenbach, supra,* 383 U.S. at 332 (emphasis added), this Court described the operation of Section 4(d):

> Section 4(d) further assures that an area need not disprove each isolated instance of voting discrimination *in order to obtain relief in the termination proceedings.*

Again, in *Gaston County* v. *United States,* 395 U.S. 285, 286–287 (footnotes omitted), the Court explained the operation of Section 4:

> The Voting Rights Act of 1965 suspends the use of any test or device as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presidential election. Suspension is automatic upon publication in the Federal Register of determinations by the Attorney General and the Director of the Census, respectively, that these conditions apply to a particular governmental unit. If the unit wishes to reinstate the test or device, it must bring suit against the Government in a three-judge district court in the District of Columbia and prove "that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color," § 4(a). The constitutionality of these provisions was upheld in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966).

This interpretation was reiterated this Term in *United Jewish Organizations, supra,* slip op. 11 (emphasis added):

> Under § 4, a State became subject to § 5 whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area—in the case of New York, * * * that a literacy test was in use in certain counties in 1968 and that fewer than 50% of the voting age residents in these counties voted in the presidential election that year. At that point, New York could have escaped coverage by undertaking to demonstrate *to the appropriate court* that the test had not been used to discriminate within the past 10 years, an effort New York unsuccessfully made.

The legislative history of Section 4(d) also indicates that Congress intended that it apply, not at the determination stage, but in suits brought to terminate coverage, after the determination of coverage has been made. The House Committee Report in 1965 states the intended purpose of Section 4(d):

> This subsection clarifies the burden of proof required of a State or political subdivision *to resume use of tests or devices in those situations where resumption would not be precluded because of subsection 4(a).* This subsection provides that a State or political subdivision, not barred from relief under the proviso to subsection 4(a), shall not be determined to have engaged in the use or tests or devices for the

> purpose or with the effect of denying or abridging the right to vote on account of race or color if [the jurisdiction can prove that the three subparts of § 4(d) apply]. A promise not to violate the law would not meet the test of this subsection. [H.R. Rep. No. 439, 89th Cong., 1st Sess. 26 (1965), emphasis added.]

Thus, petitioners' argument that the Attorney General must take Section 4(d) into account when making his Section 4(b) determinations is contrary to the statutory language, to the legislative history, and to this Court's decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-60

DOLPH BRISCOE,
Governor of the State of Texas, *et al.*,
Petitioners,

v.

GRIFFIN B. BELL,
Attorney General of the United States, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEADERSHIP CONFERENCE ON CIVIL RIGHTS, AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW

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February 25, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-60

DOLPH BRISCOE,
Governor of the State of Texas, *et al.*,
Petitioners,

v.

GRIFFIN B. BELL,
Attorney General of the United States, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEADERSHIP CONFERENCE ON CIVIL RIGHTS, AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW

INTEREST OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) is a nonprofit corporation dedicated to ensuring that the civil rights of Mexican Americans are properly protected. With offices throughout the Southwest, in California, and in Washington, D.C., MALDEF provides legal assistance to safeguard the Mexican American community's educational, political and voting rights.

Protecting the voting rights of Mexican Americans has long been one of MALDEF's key concerns. It has represented Mexican American voters throughout the South-

west, and provided technical assistance to the Congressional committees which held hearings on the Voting Rights Act Amendments of 1975. The voting rights of Mexican American citizens in Texas have been of particular concern to MALDEF. It has devoted substantial resources to monitor and implement the 1975 Amendments, and through its office in San Antonio has brought many cases under the Act and filed other actions challenging discriminatory voting practices and procedures on behalf of Mexican American voters in Texas. However, MALDEF does not have sufficient resources to challenge all such practices. Thus, continued enforcement of the Voting Rights Act Amendments of 1975, which are here challenged by the State of Texas, is essential if the voting rights of the State's minority citizens are to be fully protected.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation incorporated under the laws of the State of New York. It was founded to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented minorities before this Court and the lower courts in litigation to secure their constitutionally protected right to vote. *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976); *National Association for the Advancement of Colored People v. New York,* 413 U.S. 345 (1973); *Smith v. Allright,* 321 U.S. 649 (1944).

The Leadership Conference on Civil Rights comprises 137 civil rights, fraternal, religious, labor, and civic organizations, as well as organizations for the rights of women and the handicapped. In its strive for civil rights the Leadership Conference has been especially concerned with the right to vote and has worked for the enactment of the Voting Rights Act of 1965, its successors and extensions, and for the full implementation and enforcement of these laws in the interest of the right to vote for all Americans.

The Lawyers' Committee for Civil Rights under Law is a nonprofit corporation organized in 1963 at the request of the President of the United States; its Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process. Among its activities has been the provision of counsel in voting rights cases throughout the South; in this regard, the Committee has been particularly concerned with enforcement of the Voting Rights Act.

The written consent of the parties, pursuant to Rule 42(2) of the Supreme Court of the United States, is filed herewith.

STATEMENT OF THE CASE

The Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*, (hereinafter the "1965 Act"), has been hailed as the most effective civil rights legislation ever passed.[1] Since its enactment, the number of blacks registered to vote in the seven southern states covered by the Act has nearly doubled, and the number of black elected officials has increased almost tenfold.[2] The Chairman of the United

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[1] H.R. Rep. No. 94-196, 94th Cong., 1st Sess. (1975) at 4 [hereinafter "H.R. Rep. 94-196"].

[2] Senate Hearings Before the S. Subcomm. on Constitutional Rights, Extension of the Voting Rights Act of 1965, 94th Cong., 1st Sess. (1975) at 121, [hereinafter "1975 Senate Hearings"]. *See also* United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (1975) at 40-52 [hereinafter "*Ten Years After*"].

States Civil Rights Commission has underscored the importance of the 1965 Act:

> The Voting Rights Act, as a symbol of national commitment and as a set of enforcement mechanisms, has contributed greatly to the changing political circumstances of minorities in the covered jurisdictions. Where earlier legislation proved ineffective, the Voting Rights Act has made the 15th amendment a living, forceful entity in many areas. Vigorously enforced, the act can ensure that minority citizens will not be deprived of their right to participate in their own government.[3]

The 1965 Act, however, proved deficient in one major respect: it provided no protection to Mexican Americans and other language minorities subjected to the same forms of voting discrimination suffered by southern blacks. Like blacks, Mexican Americans have long been excluded from the electoral process. In *White v. Regester*, 412 U.S. 755, 768 (1973), this Court affirmed the district court's findings that:

> "[A] cultural incompatibility ... conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than blacks were formerly denied access by the white primary."

English-only elections, intimidation, discriminatory enforcement of electoral laws, gerrymandering, multimember districting, and widespread use of at-large elections also have denied Mexican Americans equal access to the electoral process.[4] In 1974 the disparity between Mexican American and white registration in some areas of

[3] Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. (1975) at 29 [hereinafter "1975 House Hearings"].

[4] *See* discussion, *infra*, at 28-42. *See also* H.R. Rep. 94-196 at 16-23.

Texas was estimated at 10-15 percent,[5] and Mexican Americans held only 2.5 percent of the State's elected offices even though they comprise approximately 18 percent of its population.[6] Blacks in Texas, who comprise approximately 12 percent of the State's population, have suffered similar treatment, with similar results.[7] In 1974, blacks held only .5 percent of the elected offices in Texas.[8]

In January 1975 the United States Commission on Civil Rights recommended that Congress expand the 1965 Act to protect the voting rights of language minority citizens.[9] Following the Commission's recommendation, Congress held hearings to examine the evidence of voting discrimination against language minorities. The voluminous hearing record documented a pattern of voting discrimination against Mexican Americans throughout the Southwest similar to that which led to enactment of the 1965 Act.[10]

Confronted with such evidence, Congress voted overwhelmingly[11] to enact the Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 42 U.S.C.A. § 1973 *et*

[5] 1975 House Hearings at 807-09.

[6] *Id.* at 276.

[7] 1975 House Hearings at 276, 360-61, 367-69. *See also White v. Regester, supra.* There are more blacks living in Texas than in any of the southern states covered by the 1965 Act. Texas has almost 1.5 million minority residents over the age of 25, or three times the number of minorities in the largest of the southern covered jurisdictions. 1975 House Hearings at 360.

[8] 1975 House Hearings at 248, 276.

[9] *Ten Years After*, at 355a.

[10] *See generally* H.R. Rep. 94-196 at 16-23. *See also* 1975 Senate Hearings at 96-97, 1975 House Hearings at 399-405.

[11] The House vote was 341 yeas, 70 nays; the Senate vote 77 yeas, 12 nays.

seq. (1976 Supp.) (hereinafter the "1975 Amendments"). Congress found that ". . . voting discrimination against citizens of language minorities is pervasive and national in scope," that "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process," and that "in many areas of the country, this exclusion is aggravated by acts of physical, economic and political intimidation." 42 U.S.C.A. §§ 1973b(f)(1), 1973aa-1a(a) (1976 Supp.).

In September, 1975, the Attorney General and the Director of the Census determined that the entire state of Texas is subject to Title II of the 1975 Amendments.[12] As a consequence, Texas and all political subdivisions within it may no longer conduct English-only elections and, like the Southern states covered by the Voting Rights Act since 1965, may not enforce changes in electoral laws or procedures without first establishing to the satisfaction of the Attorney General or a three-judge district court in the District of Columbia that the change does not have a discriminatory purpose or effect. The 1975 Amendments also made applicable to Texas the provisions of the 1965 Act which authorize the Attorney General to assign federal examiners and observers to register eligible voters and observe the conduct of elections.

Extension of the Voting Rights Act to Texas has given its Mexican American and black citizens reason to hope that they may finally be able to participate in the electoral process in a free and unimpaired manner, and thereby protect their full range of political and civil rights. Texas, however, now seeks to avoid this result, arguing that the Attorney General and Director of the Census, to whom Congress delegated enforcement responsibility, made technical errors in the interpretation and application of the coverage formula of the 1975 Amendments. The decisions below, as well as the brief herein of the Attorney General and Director of the Census, demonstrate that the arguments Texas makes are without merit. Accordingly, this brief will not repeat the Attorney General's arguments. Rather, Section I discusses several additional reasons why Texas' arguments are without merit, and Sections II and III demonstrate that the Attorney General's interpretation of the statute is consistent with one of the primary purposes of the 1975 Amendments, namely, the extension of the protections of the Voting Rights Act to Mexican American and black voters in Texas. Finally, Section IV demonstrates that extension of the Act to Texas will better enable its minority citizens to eliminate discrimination in education, housing and other areas.

[12] 40 Fed. Reg. 43746 (Sept. 23, 1975).

SUMMARY OF ARGUMENT

The brief for the Attorney General and Director of the Census demonstrates that petitioners' arguments regarding the construction and application of the Voting Rights Act Amendments of 1975 are without merit. The construction of the statute by the Attorney General and the Director of the Census should be given great deference because Congress has delegated to them responsibility for enforcing it. Section 4(b) of the statute expressly precludes judicial review of findings of fact by the Attorney General and the Director of the Census made to determine which jurisdictions are covered by the 1975 Amendments. This Court does not have jurisdiction to hear

petitioners' constitutional argument because it was not presented to a three-judge district court as required by 28 U.S.C. §2282.

The Attorney General's construction of the 1975 Amendments implements a primary Congressional purpose, namely, the extension of the protections of the Voting Rights Act of 1965 to minority voters in Texas. The legislative history of the Amendments demonstrates that Texas was among the jurisdictions Congress intended to be covered by the preclearance and related provisions of the 1965 Act. The legislative record reveals that English-only elections, discriminatory enforcement of registration and election laws, overt discrimination against minority voters and candidates, and sophisticated devices which dilute minority votes have combined to exclude Mexican Americans and blacks from participation in the Texas political system. Congress found that these practices are strikingly similar to those which existed in the South prior to the enactment of the Voting Rights Act of 1965. As in the South, case-by-case litigation challenging voting discrimination in Texas has not been effective; political jurisdictions intent on discrimination have either ignored court decrees or evaded them by adopting new but equally discriminatory practices. For these reasons, Congress intended to extend the provisions of the Voting Rights Act to Texas. Thus, petitioners' arguments, which if accepted would exclude it from the Act's coverage, should be rejected.

Extension of the Voting Rights Act to Texas will help to eliminate other forms of discrimination. Mexican Americans in Texas have long suffered discrimination in education, housing, employment and law enforcement. Congress recognized that these forms of discrimination can best be eliminated by guaranteeing Mexican Americans the right to vote and an equal opportunity to participate in the State's political system.

ARGUMENT

I.

TEXAS' ARGUMENTS REGARDING THE CONSTRUCTION AND APPLICATION OF THE VOTING RIGHTS ACT AMENDMENTS OF 1975 ARE WITHOUT MERIT.

Texas contends that the Attorney General misconstrued the phrase "test or device" as used in Section 4(b) by failing to consider the factors set forth in Section 4(d) relating to suits to terminate coverage. Brief for the Petitioners at 13-17 (hereinafter "Pet. Br."). It also contends that the Director of the Census misconstrued the phrase "such persons" as used in Section 4(b) to mean voting age citizens rather than registered voters. Pet. Br. at 8-13.

As the Attorney General's brief shows, judicial decisions and the legislative history of Section 4(b) establish that these arguments are without merit. The Attorney General's and Director of the Census' construction of Section 4(b) is especially important because Congress has delegated to them responsibility for enforcing the Act. This Court has stated that "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965), *rehearing denied*, 380 U.S. 989 (1965).[13] Such deference is particularly appropriate where, as here, the enforcing agencies' construction of the statute is consistent with their prior practices. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J., concurring).

Texas also contends that, assuming the Director of the Census correctly construed Section 4(b), he improperly

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[13] *Accord, Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

applied it in determining the number of voting age citizens in the state by miscounting the number of non-citizens of voting age. Pet. Br. at 22-26. This argument, however, disregards the last sentence of Section 4(b), which states:

> The determination or certification of the Attorney General or of the Director of the Census under this section . . . shall not be reviewable in any court and shall be effective upon publication in the Federal Register. [42 U.S.C. §1973b(b)].

In *South Carolina v. Katzenbach,* 383 U.S. 301, 322 (1966), this Court upheld the constitutionality of this provision, and emphasized that it precludes judicial review of Census Bureau statistical findings like those Texas now challenges.[14]

Finally, Texas argues that the principles of *Younger v. Harris,* 401 U.S. 37 (1971), and related cases entitled it to a predetermination hearing. Pet. Br. at 18-21, 26-28. The Court of Appeals properly rejected this argument because it amounted to a constitutional challenge to the Voting Rights Act which could only be heard by a three-judge court pursuant to 28 U.S.C. §2282. *Briscoe v. Levi,* 535 F.2d 1259, 1265-66 (D.C. Cir. 1976).

Even if this Court had jurisdiction to hear petitioners' constitutional challenge, it is important to note that the cases Texas cites neither limit Congress' authority under

[14]It should be noted that the scope of review issues presented in this case are different than those presented in *Morris v. Gressette, prob. juris. noted,* 45 U.S.L.W. 3407 (Dec. 6, 1976) (No. 75-1538). *Morris* involves issues regarding the scope of review of Attorney General determinations pursuant to the preclearance provisions of Section 5, whereas this case involves initial coverage determinations pursuant to Section 4(b). Section 5, unlike Section 4(b), does not in any way limit the scope of judicial review.

the Fourteenth and Fifteenth Amendments to protect the voting rights of racial and language minorities, nor provide any basis for Texas' assertion that it was entitled to a predetermination hearing. For example, *Younger v. Harris, supra,* involved the power of federal courts to enjoin state court proceedings, and by its terms has no applicability to situations where state court proceedings are not pending. *Steffel v. Thompson,* 415 U.S. 452 (1974); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975).

In *National League of Cities v. Usery,* 96 S.Ct. 2465 (1976), upon which petitioners also rely, this Court held that Congress may not wield its power under the Commerce Clause to enact statutes which "impair the States' 'ability to function effectively within a federal system,'" 96 S.Ct. at 2474, so as to "'devour the essentials of state sovereignty,'" 96 S.Ct. at 2476, unless, of course, "the federal interest is demonstrably greater" under a "balancing approach." 96 S.Ct. at 2476 (Blackman, J., concurring). National League of Cities has no applicability where, as here, Congress has exercised its authority under the Fourteenth and Fifteenth Amendments to protect the voting rights of minorities in Texas and elsewhere against well-documented, widespread attack. This Court has held that the extension of similar protections to black voters in the South does not unconstitutionally infringe state sovereignty. *South Carolina v. Katzenbach, supra.* Moreover, twelve years of experience since the enactment of the Voting Rights Act demonstrates conclusively that it has not "impair[ed] the [states'] ability to function effectively within a federal system." In fact, federal laws guaranteeing voting equality preserve the federal system and protect the sovereignty of the people.

Similarly, nothing in *Rizzo v. Goode,* 423 U.S. 362 (1976), affects the power of Congress to enact legislation under the Fourteenth and Fifteenth Amendments. That

decision merely overturned a federal court injunction which this Court held ran against city officials who had not themselves committed any constitutional violation. Here, however, Congress has acted to protect the voting rights of Mexican Americans and other language minorities, and has limited the applicability of the statute to those jurisdictions where severe voting discrimination has been documented.

II.

CONGRESS INTENDED THE 1975 AMENDMENTS TO EXTEND THE PROTECTIONS OF THE VOTING RIGHTS ACT OF 1965 TO MEXICAN AMERICAN AND BLACK VOTERS IN TEXAS.

It is a well accepted principle of statutory construction that courts interpret legislation to effectuate Congress' intent. In *United States v. American Trucking Association*, 310 U.S. 534, 542 (1940), this Court held that, "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."[15]

The legislative history of the 1975 Amendments demonstrates that Congress intended to extend the protections of the 1965 Act to Mexican American voters in the Southwest, and that it was particularly concerned about widespread voting discrimination in Texas. The Report of the House Judiciary Committee states:

> The state of Texas . . . has a substantial minority population, comprised primarily of Mexican Americans and blacks. Evidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority

[15] *Accord, United States v. Alpers*, 338 U.S. 680 (1950); *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943).

> groups in ways similar to the myriad forms of discrimination practiced against blacks in the South.... Outright exclusion and intimidation at the polls are only two of the problems they face....The central problem documented is that of dilution of the vote .... As one witness noted, 'As the Mexican American or Black voter appears to threaten potentially local power structures, a wide variety of legal devices are employed to intimidate, exclude and otherwise deny voting rights to minority citizens.'[16]

The House Report further indicates that voter turnout in Texas in recent Presidential elections has been below 50% of the voting age population, and that "the only reason the state was not covered by the Voting Rights Act of 1965 or by the 1970 Amendments was that it has employed restrictive devices other than a formal literacy requirement."[17]

The House Report,[18] various tables included in the record,[19] and numerous statements during the Congressional debates[20] indicate that Texas was among the jurisdictions Congress intended would be covered by Title II of the 1975 Amendments.[21] The House Report also

[16] H.R. Rep. 94-196 at 17-19. The Report of the Senate Judiciary Committee on the Voting Rights Act Amendments of 1975 is virtually identical to the House Report. S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975).

[17] H.R. Rep. 94-196 at 17.

[18] *Id.* at 24.

[19] *E.g., id,* at 62-63.

[20] *See, e.g.*, 121 Cong. Rec. (June 2, 1975) at 4712 (Remarks of Cong. Edwards); *Id.* at 4746 (Remarks of Congresswoman Jordan).

[21] The legislative record also indicates that Congress intended Title II coverage to be triggered for the entire state of Alaska, certain counties in California, and certain areas of Arizona, Florida, Colorado, New Mexico, Oklahoma, New York, North Carolina, South Dakota, Utah, Virginia and Hawaii. H.R. Rep. 94-196 at 24.

states that Congress intended to reserve Title II coverage for those jurisdictions where "severe voting discrimination was documented."[22] As shown below, the legislative record contains extensive evidence of severe voting discrimination against Mexican Americans and blacks in Texas. Thus, in order to effectuate Congress' intent, as well as for the reasons set forth in the Attorney General's brief, the arguments Texas makes, which if accepted would exclude it from the coverage of Title II, should be rejected.

III.

THE LEGISLATIVE RECORD ESTABLISHES THAT MEXICAN AMERICANS AND BLACKS IN TEXAS HAVE BEEN SUBJECTED TO SYSTEMATIC AND PERVASIVE VOTING DISCRIMINATION.

The legislative record reveals voting discrimination in Texas on a scale paralleling that which existed in the South prior to the enactment of the 1965 Act. English-only elections, discriminatory enforcement of registration and election laws, overt discrimination against minority voters and candidates, and sophisticated devices which dilute minority votes have combined to exclude Mexican Americans and blacks from participation in the Texas political system. The record also demonstrates that widespread voting discrimination persists in Texas notwithstanding the fact that many discriminatory practices have been invalidated by federal courts; like the southern states, Texas has evaded the effect of court orders by adopting new modes of discrimination.

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[22] *Id.* at 3. Title II incorporates the preclearance provisions of Section 5, authorizes the employment of federal examiners and observers by the Attorney General, and requires bilingual elections. Title III of the 1975 Amendments, which applies in areas where "discrimination was less egregious," merely requires bilingual elections. *Id.*

A. English-only elections

The 2.2 million Mexican Americans in Texas comprise approximately eighteen percent of the State's population. An estimated 50 percent of the Mexican American population speak only Spanish, and an estimated 90 percent speak Spanish at home.[23] Nevertheless, until 1975, Texas printed all registration and other electoral materials, including ballots, in the English language only.[24] To make matters worse, Texas statutes long prohibited assistance at the polls to Spanish speaking citizens and others illiterate in English. In *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970), *vacated and remanded for appeal to the Fifth Circuit*, 401 U.S. 1006 (1971), *appeal dismissed for lack of jurisdiction*, 450 F.2d 790 (5th Cir. 1971), the court invalidated these statutes, stating:

> We cannot perceive how exercise of the 'fundamental right to vote,' which Texas undeniably grants to all illiterates who meet the qualifications prescribed by the state constitution, can be more than an empty ritual if the right itself does not include the right to be informed of the effect that a given physical act of voting will produce. [320 F. Supp. at 137].

Despite the *Garza* decision and the fact that Texas statutes now require that assistance be given non-English speaking and illiterate voters,[25] election officials in a number of Texas counties continue to refuse to provide or allow it.[26] Congressional witnesses testified that these

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[23] 1975 House Hearings at 804.

[24] *Id.* at 806.

[25] Tex. Elec. Code Ann. art. 8.13 (1976-77 Supp.) (Vernon).

[26] United States Commission on Civil Rights, Staff Memorandum, Expansion of the Coverage of the Voting Rights Act, 21-23

[footnote continued]

practices have impaired the voting rights of Texas citizens illiterate in English just as effectively as literacy tests long abridged the voting rights of southern blacks.[27] This testimony is substantiated by federal court decisions which have struck down English-only elections in areas where substantial numbers of non-English speaking voters reside.[28]

Texas now argues that a newly enacted bilingual election statute[29] has corrected the discriminatory impact of

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(June 5, 1975), [hereafter "June 1975 CRC Staff Memorandum"]; 1975 House Hearings at 819. The June 1975 CRC Staff Memorandum was prepared at the request of Senator Tunney, Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee.

[27] *E.g.*, 1975 House Hearings at 78, 369, 806.

[28] *See, e.g., Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974); *Torres v. SACS*, 73 Civ. 3921 (S.D.N.Y. July 25, 1974); *Puerto Rican Organization For Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972), *aff'd*, 490 F.2d 575 (7th Cir. 1973). *See also New York v. United States*, 419 U.S. 888 (1974), *aff'g* 65 F.R.D. 10 (D.D.C. 1974) (an election conducted only in English where significant concentrations of Spanish speaking voters reside is a discriminatory "test or device"). The discriminatory impact of English-only elections in Texas is caused in part by the segregated and unequal education provided Mexican Americans. *Infra*, at 46-47. In enacting the 1975 Amendments, Congress found that:

> Citizens of language minorities . . . are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by state and local governments, resulting in severe disabilities and continuing illiteracy in the English language. 42 U.S.C.A. § 1973b(b)(1) (1976 Supp.).

The legislative record and judicial decisions establish that these conditions are particularly serious in Texas. *E.g.*, 1975 House Hearings at 803-04, 864; *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd in relevant part*, 469 F.2d 142 (5th Cir. 1972) (*en banc*), *cert. denied*, 413 U.S. 920 (1973), *rehearing denied*, 414 U.S. 881 (1973). In *Gaston County v. United States*, 395 U.S. 285 (1969), this Court recognized the relationship between education disparities and voting discrimination.

[29] Tex. Elec. Code Ann. art. 1.08a (1976-77 Supp.) (Vernon).

English-only elections. Pet. Br. at 14. However, Congress viewed the use of English-only elections as evidence of prior discrimination requiring the application of the Voting Rights Act. The fact that Texas now claims to have ended English-only elections no more eliminates the need for the application of the Act to it than the end of literacy tests eliminated the need for the Act in the South.

In any event, several witnesses testified that the bilingual election law was passed to dissuade Congress from extending the Voting Rights Act to the state,[30] and as drawn provides little if any assistance to Spanish speaking voters. For example, Congresswoman Jordan testified that the law exempts from its requirements 102 of Texas' 254 counties and "countless precincts within the remaining counties if the precinct contains less than 5% of persons of Spanish origin. Nobody knows how many Mexican Americans are passed over by this exclusion."[31] Congresswoman Jordan also emphasized that "... more importantly, by excluding precincts within counties from coverage, local officials are provided an incentive to gerrymander precinct lines . . . and thereby escape the requirement that bilingual ballots be provided."[32]

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[30] 1975 Senate Hearings at 457, 462-63, 913.

[31] *Id.* at 246.

[32] *Id.* By letter dated March 8, 1976, to the General Counsel for the Secretary of State of Texas, the Attorney General indicated that he would not object to implementation of the Texas bilingual election law. The letter notes, however, that Section 4(f)(4) of the Voting Rights Act applies to the entire State of Texas, and requires that effective bilingual materials and assistance be provided at all stages of the electoral process and within all Texas counties, "including those that are allowed, but not mandated, to comply with the provisions of the Texas bilingual election law." Another Congressional witness testified that subdivision 2(c)(3) of the Texas Bilingual Election Statute:

[footnote continued]

B. Registration

The history of registration in Texas provides stark evidence of systematic efforts to ignore and evade the effect of judicial decrees entered to remedy voting discrimination against Mexican Americans and blacks. The process began several generations ago when it took five lawsuits over a twenty-five year period to eliminate the white primary.[33] But those decisions did not end the State's effort to exclude minorities from the electoral process. In 1966, Texas was one of the few states which still imposed a poll tax. In *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex.), *aff'd per curiam*, 384 U.S. 155 (1966), the tax was invalidated;[34] the district court found that the tax had been enacted to disenfranchise minority citizens. 252 F. Supp. at 245.

In the wake of this decision, the Texas legislature enacted what one federal court has described as "the most restrictive voter registration procedures in the nation. . . ." *Graves v. Barnes* I, 343 F. Supp. 704, 731 (W.D. Tex. 1972), *aff'd in relevant part sub nom., White v. Regester, supra.* This new law required

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. . . provides that ballots can *either* be printed in bilingual form or, at the decision of local officials, the election materials could continue to be printed only in English if a translation ballot were posted. . . .

. . . it is quite common to hold more than one election at the same time – thus requiring the voter to consider as many as three or more separate ballots. There was great concern on the part of the Mexican American leaders . . . that this posting alternative would only add to the confusion present on Election Day. [1975 Senate Hearings at 456].

[33] *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

[34] *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

annual registration and prescribed a four-month registration period ending nine months prior to November elections.[35] In *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd sub nom., Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974), these requirements were held to violate the equal protection clause because they disenfranchised over a million Texans otherwise qualified to vote. 321 F. Supp. at 1108. *See also Graves v. Barnes* I, *supra.*

Following *Beare v. Smith*, the Texas registration law was again modified, this time to authorize an automatic three-year registration renewal whenever a voter voted in a state or county election.[36] The law also required that notice be sent to all persons whose registration was expiring, but witnesses testified that the reregistration forms were in English only, and that a high proportion of Mexican Americans were required to reregister because past discrimination had inhibited them from voting.[37]

In 1975, after the Voting Rights Act was extended to Texas, the state again amended its registration procedures to require a purge of all currently registered voters.[38] The purge was never implemented because the Attorney General, acting pursuant to Section 5, objected on the ground that it would have a discriminatory impact on blacks and Mexican Americans. The letter of objection states:

> . . . We cannot conclude that the effect of the total purge to initiate the reregistration program will not be discriminatory in a prohibited way.
>
> With regard to cognizable minority groups in Texas, namely, blacks and Mexican Americans, a study of

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[35] TEX. CONST. art. VI, §2 (V.A.T.C.) (1966); Tex. Elec. Code Ann. art. 5.11a (Vernon).

[36] Tex. Elec. Code Ann. art. 5.18(b) (1975) (repealed).

[37] *E.g.*, 1975 House Hearings at 806; 1975 Senate Hearings at 745.

[38] Texas Senate Bill 300 (1975).

their historical voting problems and a review of statistical data, including that relating to literacy, disclosed that a total voter registration purge under existing circumstances may have a discriminatory effect on their voting rights. Comments from interested parties as well as our own investigation, indicate that a substantial number of minority registrants may be confused, unable to comply with the statutory registration requirements of Section 2, or only able to comply with substantial difficulty. Moreover, representations have been made to this office that a requirement that everyone register anew, on the heels of registration difficulties experienced in the past, could cause significant frustration and result in creating voting apathy among minority citizens, thus, erasing the gains already accomplished in registering minority voters.[39]

Finally, numerous witnesses testified that Mexican Americans and blacks in Texas are subjected to discriminatory treatment by local registrars. The abuses described include failure to place the names of duly registered minorities on the voting lists, unavailability of voter registration applications for registration drives, refusals to appoint minorities as deputy registrars,[40] and discriminatory enforcement of residence requirements.[41]

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[39] Letter of objection dated December 10, 1975.

[40] *E.g.*, 1975 House Hearings at 854; 1975 Senate Hearings at 245, 767, 1004-1007. *See also* H.R. Rep. 94-196 at 16; June 1975 CRC Staff Memorandum at 21-24.

[41] *E.g.*, 1975 Senate Hearings at 245-46, 947-49. Texas courts have characterized residency as an "elastic" concept which is extremely difficult to define and dependent primarily upon the intention of the applicant. This "elasticity," coupled with the presumption under Texas law that decisions of local officials

[footnote continued]

C. Discrimination at the polls

Civil Rights Commission reports and other testimony document widespread physical and economic intimidation of minority voters. Again and again, witnesses indicated that official harassment and fear of economic reprisals deter minority voting as well as registration in Texas.[42]

Civil Rights Commission observers reported physical intimidation and harassment of minority poll watchers and voters, and instances of police officers making "excessive and unnecessary appearances" at predominantly Mexican American precincts and threatening Mexican American voters.[43] After Mexican Americans in Pearsall had conducted a drive to encourage absentee voting, the sheriff "went to the homes of the Mexican Americans who had voted or were going to vote absentee intimidating them by warning that they had to be out of the area on election day. . . ."[44] Law enforcement officers in Pearsall have also frequented predominantly Mexican American precincts and taken pictures of those voting.[45]

Other witnesses described economic intimidation of minority voters, including threatened loss of jobs, credit, and business.[46] A telegram to the Department of Justice from the Chairman of the Texas Advisory Committee to

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will be overturned only if contestants meet a heavy burden of proof, facilitates discriminatory application of registration requirements. *See Guerra v. Pena*, 406 S.W.2d 769 (C.C.A. Tex. 1966).

[42] *E.g.*, 1975 House Hearings at 483-85, 521-23, 819-20, 853-56; 1975 Senate Hearings at 751-54; 967-71; H.R. Rep. 94-196 at 18.

[43] June 1975 CRC Staff Memorandum at 24-28.

[44] 1975 House Hearings at 522. *See also* 1975 Senate Hearings at 947.

[45] 1975 Senate Hearings at 948. *See also Allee v. Medrano*, 416 U.S. 802 (1974).

[46] *E.g.*, 1975 House Hearings at 521-22.

the Civil Rights Commission stated that the Committee had received complaints that "voters have been economically intimidated by threats of financial loss for failure to support certain candidates."[47] The Civil Rights Commission study of Uvalde County reported that fear of job loss and reduction of welfare benefits is a major deterrent to Mexican American political participation.[48]

Economic and physical intimidation of minority voters is facilitated by certain features of Texas election law, including the often unbridled discretion vested in local officials. A former Texas Secretary of State noted:

> The underlying problem is economic or physical intimidation at the local level of minority voters who are predominantly in lower income groups. Texas statutes place all election duties upon local officials. Even if the Secretary of State has access to information concerning intimidation or improper influence of a voter, the office has no statutory authority to take even minimal action. In addition, the [state] Attorney General can intervene only where irregularities involve more than one county.[49]

Other witnesses testified that a Texas "stub law" which requires voters to sign a ballot stub facilitates election challenges which intimidate Mexican American and black voters.[50] The testimony describes the opening of

[47] 1975 House Hearings at 819.

[48] June 1975 CRC Staff Memorandum at 33.

[49] 1975 Senate Hearings at 247-48. *See also* n. 41, *supra*.

[50] Texas Election Code Ann. Art. 8.15 requires that a voter sign a ballot stub containing a serial number corresponding to the serial number on the ballot. The stubs and ballots are deposited in separate boxes. If an election is challenged both boxes may be opened and the stubs used to trace ballots to the voters who cast them.

ballot boxes, the subpoenaing of minority voters, and the tracing of their votes followed by economic reprisals, all of which have a chilling effect on minority political participation.[51] In Pearsall, for example, a petition challenging election results stated precisely the number of votes being challenged and the reasons each vote was allegedly invalid. Specific allegations of this type could not have been made unless the ballot box had already been opened. Approximately 200 Mexican American voters were subpoenaed (no whites were subpoenaed), and the challenged votes were ultimately declared invalid.[52] In the course of a similar election challenge in Cotulla over 150 voters were subpoenaed, all of whom were Mexican Americans.[53] The discriminatory impact of such election challenges was summarized during the Congressional hearings:

> The manner in which these investigations are carried out as perceived by the Mexican American communities involved has the effect of discouraging further registration and voting. The effect is intimidation—the result is fear of exercising the constitutionally guaranteed right to vote.[54]

The legislative record also indicates that the stub law operates as a literacy test because it requires voters to sign their ballot stubs. One witness described an election won by a Mexican American candidate by 65 votes. The results were challenged, the stub box opened, a determination made that approximately 100 Mexican Ameri-

[51] *E.g.*, 1975 House Hearings at 363-64, 485, 521-22; 1975 Senate Hearings at 731-33, 946-49.

[52] 1975 Senate Hearings at 946-47.

[53] *E.g.*, *id.* at 948-49.

[54] 1975 House Hearings at 404.

can voters had signed their stubs with an "X," and the opposing white candidate was declared elected.[55]

Official intimidation, harassment, and discrimination infect all stages of the voting process in Texas. Election officials in La Salle, Uvalde and Frio Counties denied assistance to non-English speaking voters even after Texas laws were amended to require it.[56] Other witnesses described excessive demands for personal identification required only of Mexican American voters,[57] challenges to the residence of voters whom election officials felt might vote for the Raza Unida candidate, harassment of Raza Unida campaign workers even though they were working the polls outside the distance markers,[58] selective invalidation of ballots cast by minority voters, last minute unannounced changes in voting times and locations,[59] and the location of polling places in areas traditionally off-limits to or inconvenient for minorities. For example, in Jefferson County, which is approximately 25% black, polling places were located in a rod and gun club which had a totally white membership, and in a white school in an all-white section of a precinct.[60] In Villa Coronado, voting officials refused to set up a polling place in a Mexican American neighborhood where 75% of the district's

[55] 1975 House Hearings at 732.

[56] *Id.* at 818.

[57] *E.g., id.* at 810, 820; 1975 Senate Hearings at 767-69.

[58] *E.g.*, 1975 House Hearings at 820; 1975 Senate Hearings at 741-43, 967-71. The Raza Unida party is one of three political parties that Texas law officially recognizes. It is supported predominantly by Mexican American voters.

[59] 1975 House Hearings at 810, 860. *See generally* June 1975 CRC Staff Memorandum at 24-27.

[60] June 1975 CRC Staff Memorandum at 26.

population resided, thus forcing those voters to travel seven miles in order to cast their ballots.[61]

D. Discrimination against minority candidates

Mexican Americans and blacks in Texas have also been denied an equal opportunity to run for elective office. Until 1972, a filing fee discriminated against minority candidates just as effectively as the poll tax discriminated against minority voters. Over 35% of the Mexican Americans and blacks in Texas are impoverished.[62] In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court invalidated Texas' filing fee system on the ground that it denied less affluent citizens an equal opportunity to run for office. Several courts on similar grounds have invalidated requirements that a candidate own real property within the district in which he or she is running.[63] In *Pablo Puente v. City of Crystal City*, Civ. Ac. No. DR-70-CA-4 (W.D. Tex. April 3, 1970), the court found that a requirement that city council members be property owners discriminated against Mexican Americans.[64] Likewise in *Graves v. Barnes* I, *supra*, the court found that the cost of con-

[61] 1975 House Hearings at 856. *See also* 1975 Senate Hearings at 947, where evidence was given that when the polling place in Pearsall, Texas was located in the Mexican American part of town, voting participation among Mexican Americans rose to the highest levels ever; when the polling place was relocated in the white section of town, Mexican American participation dropped by 400 votes.

[62] *Infra*, at 47.

[63] *E.g., Connerton v. Oliver*, 333 F. Supp. 201 (S.D. Tex. 1971); *Duncantell v. Houston*, 333 F. Supp. 973 (S.D. Tex. 1971); *Gonzales v. Sinton*, 319 F. Supp. 189 (S.D. Tex. 1970). *See also Turner v. Fouche*, 396 U.S. 346 (1970).

[64] A Texas law that only persons who have rendered property for taxation may vote in bond issue elections was invalidated in *Hill v. Stone*, 421 U.S. 289 (1975), *rehearing denied*, 422 U.S. 1029 (1975).

ducting electoral campaigns in at-large state legislature races in Bexar County was so excessive that it inhibited the recruitment and nomination or election of Mexican American candidates. 343 F. Supp. at 731.

The expense of running in at-large elections is not the only reason their widespread use throughout the state[65] discriminates against minority candidates. One witness testified that considerably fewer minority candidates compete in the Democratic primary in at-large districts because of a common sense realization that their prospects of winning at-large races are slim.[66]

Testimony also established that in nine major Texas counties studied, candidates most often were selected either by slate-making groups, such as organized labor or businessmen, or by a more informal process which requires the candidate to have access to social, business, educational and professional associations.[67] Minorities have been denied access to both processes. In *Graves v. Barnes* II, 378 F. Supp. 640, 649 (W.D. Tex. 1974) *vacated and remanded for determination of mootness sub nom. White v. Regester*, 422 U.S. 935 (1975), the court found that in Jefferson County endorsement by a local labor organization usually leads to election, but that the local organization had never slated a black man or woman. The court noted "When called upon to explain their lack of enthusiasm for black candidates, the local labor leaders reported to the state . . . [organization] and the local black community that they would not support a black person because of the racial hostility of their predominantly white membership."[68]

[65] *Infra*, at 37.

[66] 1975 House Hearings at 436. *See Graves v. Barnes* I, *supra*, at 731-32.

[67] 1975 House Hearings at 436.

[68] The hearing record also describes a discriminatory tactic adopted by the City Council of Uvalde, which met and decided in secret not to put on the ballot the name of a duly qualified Chicano candidate for the Council. The candidate filed an action in state court. The court found that his constitutional rights had been violated. 1975 House Hearings at 854. *See also Garcia v. Carpenter*, 525 S.W.2d 160 (Tex. Sup. Ct. 1975) (arbitrary refusal to place Mexican American candidate's name on the ballot as a candidate for mayor).

The long and pervasive history of discrimination against minority candidates by traditional, well-established political organizations has encouraged minorities to establish new political parties.[69] This development, however, has not escaped the attention of Texas officials intent on perpetuating discrimination against minority candidates and voters. After *American Party of Texas v. White*, 415 U.S. 767 (1974), *rehearing denied*, 416 U.S. 1000 (1974), invalidated a Texas law which denied minor party candidates a place on absentee ballots, a new law was passed prohibiting minor political parties from holding primary elections. Texas reimburses the costs of conducting primary elections, but not the costs of holding conventions. The Attorney General objected to this new law because its impact would fall "only on one party, the Raza Unida party, and significantly limit the opportunity for Mexican Americans to nominate, on an equal basis with others, a candidate of their choice."[70]

There is also substantial evidence of racially based campaign tactics in Texas. In *White v. Regester, supra,* this Court emphasized the district court's finding that the Dallas Committee for Responsible Government, a white dominated organization that effectively controls Democratic party slating in Dallas County, had as recently as 1970 relied upon "racial campaign tactics in white pre-

[69] *See Williams v. Rhodes*, 393 U.S. 23 (1968). *See generally* Mazmanian, *Third Parties in Presidential Elections* (1974).

[70] Letter of objection dated January 23, 1976.

cincts to defeat candidates who had the overwhelming support of the black community." 412 U.S. at 767. One Congressional witness described thirty-second spots on Spanish radio stations which warned Mexican American voters that if they did not comply with all election laws, they could be sent to jail or fined $500.[71] Another witness said that racial campaigning was evident in nine major Texas counties studied, and that such campaigning is particularly discriminatory given racially polarized voting patterns in at-large election districts.[72]

Finally, the Civil Rights Commission advised Congress that it found economic and physical intimidation of minority candidates in Texas. One candidate who reported that he had suffered harassment on the job told a Commission interviewer:

> "... you see why we have such a difficult time even convincing some Chicanos to file for office, the fear for their jobs, fear of all kinds of pressure."[73]

E. Dilution of minority votes

The hearing record also documents continuous efforts by Texas officials to subject minority voters and candidates to "sophisticated" discriminatory devices such as malapportionment, gerrymandering, at-large elections, majority runoff requirements and the place system, all of which dilute the value of the vote. The House Judiciary Committee concluded that blatant intimidation and other

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[71] 1975 House Hearings at 806.

[72] *Id.* at 454-55.

[73] 1975 Senate Hearings at 999. *See generally* United States Commission on Civil Rights, Staff Memorandum, Summary of Preliminary Research on the Problems of Participation by Spanish Speaking Voters in the Electoral Process, April 23, 1975. Numerous witnesses described many instances of outright intimidation of minority candidates. *E.g.*, 1975 House Hearings at 521, 826-27, 854, 861; 1975 Senate Hearings at 735, 753-56, 774.

forms of discrimination against Mexican American and black voters in Texas

> are not the only barriers obstructing equal opportunity for political participation... The central problem documented is that of dilution of the vote —arrangements by which the vote of minority electors are made to count less than the votes of the majority. [74]

1. Malapportionment and gerrymandering

The record is replete with descriptions of malapportioned or gerrymandered electoral districts in Texas.[75] In 1969 and again in 1974 the Commissioners Court in Anderson County reapportioned and redistricted the county's four precincts.[76] In *Robinson v. Commissioners Court, Anderson County*, Civ. Ac. No. TY-CA-73-236 (E.D. Tex. March 15, 1974, *aff'd in relevant part*, 505 F.2d 674 (5th Cir. 1974),[77] the district court held that "Since the Commissioners Court did not rely on available 1970 census data in effecting the modification of the precinct lines, but rather placed exclusive reliance upon voting registration figures, the reapportionment is distorted." The court also found that the realignment followed neither established census enumeration districts

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[74] H.R. Report 94-196 at 18.

[75] *Cf. White v. Weiser*, 412 U.S. 783 (1973), where this Court invalidated reapportionment of Texas' Congressional districts because of an unequal distribution of population.

[76] The Commissioners Court of Anderson County, like Commissioners Courts throughout Texas, is a legislative body for the county and is comprised of Commissioners and a County Judge. Each Commissioner is elected from a separate precinct, but the Judge is elected at-large.

[77] The district court's opinion is reprinted in the 1975 Senate Hearings at 248.

nor logical boundaries. Rather, "The Commissioners drew a 'wedge' through the greatest black concentration within the southwestern portion of the city of Palestine, dividing the black community . . . into three Commissioner precincts." The court concluded that the redistricting and reapportionment were racially motivated. The Fifth Circuit affirmed, stating:

> . . . Unfortunately, the disrespect of voting rights is not a recent innovation in county government in Texas. *See generally, Graves v. Barnes*, W.D. Tex. 1972 (3 judge), 343 F. Supp. 704, *aff'd in part sub nom. White v. Regester*, 1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314; *Avery v. Midland County*, 1968, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45. Nor, unfortunately, is unconstitutional dilution of voting rights only a very old part of our history. *See, e.g., Graves v. Barnes*, W.D. Tex. 1974 (3 judge), 378 F. Supp. 640. Caesar found Gaul divided into three parts. Here we are confronted with a County Commissioners Court which has cut the county's black community into three illogical parts in order to dilute the black vote in precinct elections, acting as a modern Caesar dissecting its private Gaul. Such apportionment poisons our representative democracy at its roots. Our constitution cannot abide it. [505 F.2d at 676].

In *Weaver v. Commissioners Court, Nacogodoches County*, Civ. Ac. No. TY-73-CA-209 (E.D. Tex. March 15, 1974), another case discussed in the hearing record,[78] it similarly was held that an apportionment plan in Nacogodoches County constituted a racial gerrymander which "effectively fragment[ed] black voting strength . . . by dividing the area of heavy black population . . . into separate commissioner [districts]." The court found a "general lack of responsiveness on the part

[78] 1975 House Hearings at 366.

of city and county officials in Nacogodoches to the particular lives, needs and interests of black citizens of the county."[79]

In Crockett County reapportionment was used to dilute the value of Mexican American votes. In 1974, a Mexican American received the Democratic nomination, usually tantamount to election, for a seat on the County Commissioners Court. The precinct from which he was nominated was substantially Mexican American, as was one other. Prior to the general election, the Commissioners Court reapportioned the county on the basis of registered voters, not population. Since registration among Mexican Americans had been low, the Commissioners were able to isolate practically all of the Mexican Americans into one Commissioner's district, thus ensuring that only one Mexican American would be elected.[80]

Extension of the Voting Rights Act to Texas already has limited malapportionment and gerrymandering of electoral districts. The Attorney General objected to the Crockett County Commissioners Court's reapportionment of its precincts. The letter of objection states:

> Our experience indicates that Mexican Americans generally have a lower rate of voter registration than do Anglos. Thus an apportionment based on registration data is likely to have a dilutive effect on the vote of Mexican Americans. *See Eli v. Klahr*, 403 U.S. 108, 118-19 (1971) (Douglas, J., concurring).[81]

[79] *See* discussion of *Weaver v. Muckleroy*, Civ. Ac. No. 5524 (E.D. Tex. Jan. 27, 1975), *infra*, at 38-39, for evidence of the persistent efforts of Nacogodoches to dilute the value of black votes.

[80] 1975 House Hearings at 366.

[81] Letter of objection dated July 7, 1976.

The Attorney General also objected to reapportionment of Commissioners Court's precincts in Uvalde County, stating:

> . . . According to the 1970 census, Uvalde County is 50.7% Mexican American, 47.8% Anglo and 1.5% black. Information available to us indicates that the Commissioner Precinct 2 under the redistricting plan has an overwhelming concentration of Mexican Americans and in addition exceeds the norm of an ideal (population) district by a percentage of at least 11%. The other precincts, two of which are substantially over-represented, apparently have deviations of similar scope resulting in a total deviation range in excess of 20%. Thus, it would appear that the precinct with the highest percentage of Mexican Americans is the most under-represented while at least two of the remaining precincts, each with evident Anglo population majorities, show deviations indicating over-representation.[82]

In addition, the Attorney General has objected to gerrymandered and registration-based reapportionments in Waller[83] and Frio[84] Counties, and has twice objected to plans submitted by the state of Texas subdistricting

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[82]Letter of objection dated October 13, 1976.

[83]Letter of objection dated July 27, 1976.

[84]Letter of objection dated April 16, 1976. In *Padillo v. Valverde County*, Civ. Ac. No. 9062 (C.C.A. Tex.) an action was filed in 1969 in Texas District Court charging malapportionment and gerrymandering of Valverde County Commissioner Court precincts. Plaintiffs' amended complaint alleged that 94% of the county's population resided in one precinct and that the remaining 6% of the county's residents lived in the other three precincts. The amended complaint also alleged that precinct lines had been gerrymandered to discriminate against the county's substantial Mexican American population. The parties agreed to a redistricting plan, and settled the matter out of court.

multi-member Texas House of Representative districts on the ground that the plans gerrymander minority areas.[85] Despite the Attorney General's objection, the Frio County Commissioners announced they would conduct a May 1, 1976 primary election pursuant to the objectionable plan. Mexican American voters in Frio County secured a temporary restraining order enjoining the primary, *Sylva v. Fitch*, Civ. Ac. No. SA-76-CA-126, (W.D. Tex. Sept. 26, 1976), and subsequently reached an agreement with the County Commissioners regarding a new apportionment plan. The new plan was approved by the federal court, but the Commissioners are now attempting to set it aside on appeal.

Congressional witnesses underscored the widespread use and discriminatory impact of malapportionment and gerrymandering.[86] One witness stated:

> . . . There are 254 counties in Texas each electing a County Commissioners Court. . . . In almost every plan I have been asked to look into, minority political rights have been gerrymandered in ways similar

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[85]Letters of objection dated January 23, 1976 and January 26, 1976. In the January 23 letter of objection, the Attorney General notes:

> Regarding Districts 32A-32I in Tarrant County, it appears that portions of the new single-member districting lines are drawn through cognizable minority residential concentrations resulting in an apportionment or fragmenting of these areas into four districts, only one of which has a significant minority population, while fairly drawn alternative districting plans would avoid placing portions of the minority residential concentrations in as many districts and would result in two districts with significant minority populations.

See Graves v. Barnes I and II, *supra*.

[86]*E.g.*, 1975 House Hearings at 395-96, 494-95; 1975 Senate Hearings at 245.

to those documented in Anderson, Nacogodoches and Crockett Counties.[87]

2. Multi-member districting

Congress found and federal courts have held that multi-member districting in Texas unconstitutionally dilutes the value of Mexican American and black votes. Several courts have also found that minority votes are further diluted by the use in such districts (and in multi-member districts that do not themselves have a diluting effect) of the place system and the requirement of a majority runoff.[88]

The reapportionment plan adopted for the Texas State House of Representatives based on the 1970 census is illustrative of the discriminatory use of multi-member districting and official evasion of judicial decrees. The hearing record indicates that the initial plan was declared unconstitutional by a state district court within days after it was enacted.[89] The Texas Supreme Court affirmed. *Smith v. Craddick*, 471 S.W.2d 375 (Tex. Sup. Ct. 1971). Although the Texas Constitution states that in such a situation the state Legislative Redistricting Board must prepare an alternate plan of apportionment, the members of the Board refused to act until expressly ordered to do so by the Texas Supreme Court. *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. (Sup. Ct. 1971). The court warned the Board that the use of multi-member districts might dilute the electoral rights of Mexican Americans and blacks:

> In exercising its discretion as to whether to create multi-member districts within a single county, we

[87] 1975 Senate Hearings at 956.

[88] *See* discussion, *infra*, at 36-41.

[89] 1975 House Hearings at 366.

> must assume that the Board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the voting strength of any political or racial elements of the voting population. [471 S.W.2d at 575].

Notwithstanding this warning, Board members admitted under oath that they did not at any point consider the possible effect of multi-member districts on Mexican Americans or blacks.[90] Instead, the Board adopted a multi-member districting plan which was invalidated in a series of federal court actions. In the first of these actions, *White v. Regester, supra,* this Court affirmed the judgment of a three-judge district court (*Graves v. Barnes* I, *supra*) invalidating multi-member districts in Dallas and Bexar Counties and ordering those districts to be redrawn into single-member districts. This Court reiterated the lower court's findings regarding the history of official racial discrimination in Texas, Texas laws requiring a majority vote as a prerequisite to nomination, the use of a "place system," racial campaign tactics, and the district court's conclusion that " 'the black community has been effectively excluded from participation in the Democratic primary selection process,' . . . and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." 412 U.S. at 766-67. This Court also relied on the lower court's findings that Mexican Americans in the Bexar community along with other Mexican Americans in Texas had long suffered from invidious voting discrimination, and sustained the judgment of the district court that:

> . . . the multi-member districts, as designed and operated in Bexar County, invidiously excluded Mexican Americans from effective participation in politi-

[90] 1975 House Hearings at 366-67.

cal life, specifically in the election of representatives to the Texas House of Representatives [412 U.S. at 769].

On remand, multi-member districts in Tarrant, El Paso, Travis, Jefferson, Lubbock, McClennan, and Nueces Counties were found to deny Mexican American and black voters an equal opportunity to participate in the electoral process. *Graves v. Barnes* II, *supra.* In addition, the Galveston County multi-member district was held to be the result of an unconstitutional gerrymander. Subsequently, Texas adopted a new reapportionment plan which replaced the multi-member districts with single-member districts. For this reason, this Court vacated and remanded for a determination of mootness. *White v. Regester,* 422 U.S. 935 (1975). However, before the district court could consider the matter the Attorney General objected to three gerrymandered districts contained in the plan.[91] *Graves v. Barnes* III, 408 F. Supp. 1050, 1052 (W.D. Tex. 1976).

3. The place system, majority runoff requirements, and at-large elections

The foregoing multi-member districting decisions have not ended efforts in Texas to dilute the value of minority votes. Congress found that a substantial number of Texas jurisdictions have now adopted the place system, majority runoff requirements, and at-large elections, and that each of these "sophisticated" devices abridges the voting rights of Texas Mexican Americans and blacks.[92]

The place system requires candidates in multi-member districts or at-large elections to run for a specified numbered post. Each voter casts one vote for one candidate

[91] *See* discussion, *supra,* at n. 85.

[92] H.R. Rep. 94-196 at 18-19.

for each post. The system thus lends visibility to specific candidates in an at-large field, and makes it possible to "spotlight" minority candidates in specific match races. By matching minority candidates with particularly strong opposing candidates, minority voters are effectively prevented from combining their voting strength in support of a candidate running at-large.[93]

Majority runoff and at-large election requirements likewise dilute the votes of minorities. Both devices are particularly discriminatory when adopted by jurisdictions with a substantial, but not majority, minority population. This is especially true when these devices are combined with a place system. Each tends to ensure that through bloc voting the white majority can elect the candidate of its choice, but that minority populations cannot.[94]

The record establishes that the at-large structure, with accompanying variations of the majority runoff and numbered place system, is used in at least 1,300 political subdivisions in Texas, including all of the more than 1,100 school districts in the state and 174 of its largest cities.[95]

The House Judiciary Committee concluded that these devices had become particularly widespread "in the wake of the recent emergence of minority attempts to exercise the right to vote," and that their use ". . . effectively den[ies] Mexican American and black voters in Texas

[93] 1975 House Hearings at 402, 422-23. *See generally* Young, *The Place System in Texas Elections,* Austin, Texas: Institute of Public Affairs, 1965, reprinted in part in the 1975 House Hearings at 986 *et seq.*

[94] 1975 House Hearings at 389-90, 402-03, 417-28, 1975 Senate Hearings at 488-93. *See also White v. Regester, supra: Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976).

[95] 1975 Senate Hearings at 462.

political access in terms of recruitment, nomination, election, and ultimately, representation."[96] This finding is substantiated by a number of judicial decisions reprinted or summarized in the legislative record. For example, in *Lipscomb v. Wise*, 399 F. Supp. 782, 790 (N.D. Tex. 1975),[97] the court held that at-large voting in Dallas dilutes the value of black votes, stating:

> . . . it is clear that the present system of requiring all members of the Dallas City Council to run at-large on a city-wide basis involves dilution. In this regard . . . two factors are of particular significance. These are the existence of past discrimination in general, which precludes effective participation in the electoral system and a customary lesser degree of access to the process of slating candidates than enjoyed by the white community.
>
> . . . Meaningful participation in the political process must not be a function of grace, but rather is a matter of right.

Similarly, in *David v. Garrison*, Civ. Ac. No. TY-73-CA-113 (E.D. Tex. 1975),[98] the court invalidated the city of Lufkin's use of at-large elections combined with a majority vote requirement and place system. The first black to run for the City Commission obtained a plurality of votes in the initial election, but was defeated in the runoff. The black candidate received total support from black voters but negligible support from whites. The court held that:

> The majority place system, as utilized by the City of Lufkin, operates to minimize the voting strength of the black residents, and, coupled with the at-large system, tends to create a racial polarization in voting.

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[96] H.R. Rep. 94-196 at 19-20.

[97] Discussed in the 1975 Senate Hearings at 915.

[98] Discussed in the 1975 Senate Hearings at 919.

The discriminatory use of a majority runoff requirement and place system in the context of at-large elections was also invalidated in *Weaver v. Muckleroy*, Civ. Ac. No. 5524 (E.D. Tex. Jan. 27, 1975).[99] The case arose in the city of Nacogodoches, which has a 15% black population. The court's opinion reveals that no black had ever won a county-wide or city election. The city charter provided for a five-member commission form of government, and had not been amended since 1929. Since that time city elections had been held at-large, with the office awarded to candidates securing a plurality of the votes.

In the spring of 1972, a black ran for the City Commission. He came close to winning a plurality in an election which registered the highest turnout in the history of Nacogodoches city elections. In June, 1972, the all-white City Commission proposed the first amendment to the city charter in 43 years, the institution of a majority runoff, numbered place system. The proposal was adopted by Nacogodoches voters.

In April 1973 another black ran for City Commissioner. He won a plurality of the votes in the first election, but lost the runoff. At the same time, the City Commissioners changed the date of election from April to mid-July in order to avoid the impact of the votes of students at a predominantly black college in the area. On the basis of these facts, the district court held that the at-large, majority runoff, numbered place system tended to abridge the voting rights of black citizens, and ordered the institution of single-member districts. *See also Graves v. Barnes* II, *supra*, 378 F. Supp. at 659.

The hearing record contains additional testimony regarding the discriminatory purpose and effect of at-large,

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[99] Discussed in the 1975 House Hearings at 400-401; reprinted in 1975 Senate Hearings at 252-54.

majority runoff, place system elections. One witness testified that, as a consequence of the widespread use of at-large elections, "you will find little or no representation in the so-called impact area, the heavily concentrated Mexican American, black and minority areas." [100] A study included in the record concluded that fear of bloc voting by minority voters caused several Texas communities to adopt the place system:

> A member of one city charter commission admits that the place system was written into the charter "to prevent minority groups from voting against all candidates but one in order to ensure their man got the most votes." An individual who helped to draft another charter candidly acknowledged that the place system was selected so that the Negro minority in his city would be unable to elect a councilman.[101]

Congress was informed that the preclearance provisions of Section 5 would protect minority voters from the discriminatory use of at-large, majority runoff, and numbered place rules.[102] This prediction has proven true. To date, the Attorney General has issued numerous letters of objection barring implementation of such devices. Submissions objected to were filed by independent school districts, municipalities, and Commissioners Courts. The Attorney General's objection to the designation of a place system and the adoption of a majority vote requirement by the Hereford Independent School District is illustrative. The letter of objection notes:

> With respect to the designation of election by place and the majority vote requirement . . . [w]e have noted particularly the growing minority population

[100] 1975 House Hearings at 483.

[101] 1975 Senate Hearings at 988.

[102] 1975 Senate Hearings at 489.

> of the district, the electoral history of the district, the increase in minority political activity, the lack of any minority representation on the Board of Trustees of the district, and the fact that these features would be added to an at-large election system.
>
> . . . The opportunity for minority voters to elect a representative of their choice to the school board is significantly lessened by the addition of the numbered place requirement. . . . The majority vote requirement exacerbates this problem, by preventing a minority candidate who receives a plurality against two or more majority candidates from being elected without facing a run-off election against a single majority candidate.[103]

4. Annexations and de-annexations

Annexations and de-annexations of areas with large white voting populations are also used in Texas to reduce minority participation in the electoral process. For example, in 1972, the Pearsall City Council annexed a 100% white development but refused to annex compact, contiguous areas of high Mexican American concentration, and San Antonio, where the City Council is elected at-large, made massive annexations including irregular or finger annexations on the city's heavily white north side.[104] The Attorney General subsequently objected to the San Antonio annexation on the ground that the proportional strength of the Mexican American population necessarily has been reduced. . . ."[105]

[103] Letter of objection dated May 24, 1976.

[104] 1975 House Hearings at 368. *See City of Petersburg, Virginia v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), where the court affirmed a finding that an annexation of predominently white areas diluted the votes of black citizens.

[105] Letter of objection dated April 2, 1976. This letter of objection was withdrawn after San Antonio voters approved a plan for the election of the City Council from single-member districts.

The Attorney General also objected to a proposal to establish the Westheimer Independent School District in an area which had been part of the Houston Independent School District (HISD). The letter of objection states that the Justice Department had received comments from interested persons alleging that the proposal had a discriminatory purpose, and that:

> . . . Such comments point out that the Westheimer district was first proposed shortly after . . . minority-backed candidates first gained control of the board and shortly after the HISD had been ordered to undertake substantial school desegregation. The materials which accompany your submission do not refute such allegations. In addition, it appears that minority residents in the proposed Westheimer district have no realistic opportunity to achieve the sort of representation in the proposed Westheimer Independent School District that they now enjoy in the Houston Independent School District.[106]

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[106] Letter of objection dated January 13, 1977. On January 15, 1977, the Westheimer Independent School District held special elections to select school trustees pursuant to the reapportionment and new electoral procedures to which the Attorney General had objected. The certified winners assumed official responsibilities the following day. On January 20, 1977 the Attorney General filed an action in the United States District Court for the Southern District of Texas, *United States v. Interim Board of Trustees of the Westheimer Independent School District, et al.*, (Civ. Ac. No. H-77-121), seeking to set aside the election and enjoin defendants from taking any action purported to be official action of the Westheimer Independent School District by virtue of their election pursuant to the objectionable procedures.

The hearing record, together with events subsequent to the passage of the Voting Rights Act Amendments of 1975, thus establishes a systematic and pervasive pattern of voting discrimination against Mexican Americans and blacks in Texas. The pattern revealed is strikingly similar to that which existed in the South and led to the enactment of the Voting Rights Act of 1965.[107] The record also establishes that case-by-case litigation has not and cannot end voting discrimination in Texas.[108] Preparation of voting rights cases is extraordinarily costly and time consuming, and neither the Justice Department nor private parties have the resources to remedy all discriminatory voting practices. More important, political jurisdictions in Texas, intent on perpetuating the political subordination of minorities, persistently violate court orders or evade them by adopting new modes of discrimination not covered by the letter of the decree.[109]

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[107] *Cf. Ten Years After.*

[108] H.R. Rep. 94-196 at 26-27; 1975 House Hearings at 499; 1975 Senate Hearings at 767-68. Case-by-case litigation was equally ineffective in the South. From 1957 until 1965, the Justice Department filed 71 actions under the 1957, 1960 and 1964 Civil Rights Acts. These actions included challenges to discriminatory registration practices, private and official intimidation, and omnibus actions against the discriminatory application of voter qualification tests. Despite such efforts, the percentage registration of blacks and the percentage of black elected officials in the South increased by only nominal amounts, if at all. Derfner, *Racial Discrimination and The Right to Vote*, 26 Vand. L. Rev. 523, 548-49 (1973).

[109] This was also characteristic of the southern states now covered by the Voting Rights Act. In *South Carolina v. Katzenbach*, *supra*, 383 U.S. at 314, 335, this Court stated:

> Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the states affected have merely switched to discriminatory devices not

[footnote continued]

It was for similar reasons that Congress enacted the Voting Rights Act of 1965. That Act proved effective,[110] and evidence of widespread voting discrimination against Mexican Americans led Congress in 1975 to extend its protections to language minorities in Texas and elsewhere.[111] The preclearance provisions of Section 5 already have operated to prevent the implementation of many discriminatory changes in Texas voting pro-

covered by federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. . . . Congress knew that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.

It is also noteworthy that the bulk of Section 5 objections entered against southern jurisdictions have involved the same types of discriminatory devices, for example, at-large elections and multi-member districting, that the Attorney General most often has objected to when employed in Texas. *See* H.R. Rep. 94-196 at 9-10; 1975 House Hearings at 183-85, 629.

[110] *See* discussion, *supra*, at 3-4. While the significant increase in black registration and turnout in the South is attributable in part to the presence of federal examiners and observers, the preclearance provisions of Section 5 have had the most significant impact on voting discrimination. Section 5 avoids the cost, delay and randomness of the case-by-case approach. Shifting the burden of proof to covered jurisdictions has prevented the enforcement of subtle discriminatory devices such as gerrymandering, multi-member districting, and the numbered place system which tend to dilute the value of the vote. Moreover, covered jurisdictions are discouraged from contriving new modes of discrimination for the purpose of evading the effect of judicial decrees. 1975 House Hearings at 331-32, 640-41.

[111] H.R. Rep. 94-196 at 16-27.

cedures.[112] As Congress found, it is only through continued enforcement of the Voting Rights Act that Mexican Americans as well as blacks in Texas will enjoy their full range of political and civil rights.[113]

IV.

EXTENSION OF THE VOTING RIGHTS ACT OF 1965 TO TEXAS WILL FACILITATE THE ELIMINATION OF OTHER FORMS OF ECONOMIC AND SOCIAL DISCRIMINATION.

Protection of the constitutional right to vote is the primary objective of the Voting Rights Act of 1965 and

[112] As of January 1, 1977, approximately 36 letters of objection had been interposed in response to submissions from Texas. Significantly, most of these objections involve malapportionment, gerrymandering, at-large elections, majority runoff requirements, place system, and other forms of "sophisticated" discriminatory devices which are difficult and time consuming to challenge through litigation. The Committee on Elections of the Texas House of Representatives reported in "Interim Report: The Voting Rights Act in Texas" [hereinafter "Interim Report"] that during the first twelve months of Voting Rights Act coverage the Attorney General had objected to approximately 3% of Texas' Section 5 submissions. Interim Report at 171. This compares to an objection rate over a 10-year period of approximately 1.1% for Virginia and 2% for South Carolina. *See* 1973 Senate Hearings at 596-600. The Committee Report also notes that the number of objections (25) "has pushed Texas into fourth place among all the states covered by Section 5 of the Voting Rights Act. This figure includes the deep southern states now entering their twelfth year of coverage, as only Georgia and Louisiana (who have an estimated 37 objections each) and Mississippi (with 29) are running ahead of Texas in the number of VRA objections." Interim Report at 172. The Committee states that more objections had been interposed in a single year in Texas than in any of the southern states subject to the Act. *Id.* at 172-73. The Report further notes that many Texas governmental bodies "have felt obliged to risk a court attack on their changes and, perhaps, even the overturning of their elections by going ahead and using changes before receiving a no objection ruling from the Justice Department." *Id.* at 177.

[113] *See* H.R. Rep. 94-196 at 21-22, 26-27; 1975 House Hearings at 492.

the 1975 Amendments. However, the Voting Rights Act has a critical secondary objective. As this Court held in *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the right "to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." Minorities able to participate fully in the electoral process are in a better position to deal effectively with other forms of economic and social discrimination.

This secondary objective of the Voting Rights Act has particular importance in Texas where Mexican Americans and blacks have long been subject to a variety of discriminatory practices.[114] In *Graves v. Barnes* I, *supra*, the three-judge district court found:

> Because of long-standing educational, social, legal, economic, political and widespread prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto*, the Mexican American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the field of education, employment, economics, health, politics and others. [343 F.Supp. at 728].

Pervasive discrimination in education is illustrated by the fact that most major metropolitan school districts in the state have been ordered by federal courts to eliminate

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[114] *See* 1975 House Hearings at 175-78, 277-79 for testimony that the Justice Department has had to bring lawsuits against state and local governments to protect Mexican Americans in Texas against discrimination in education, employment, housing and law enforcement. The legislative record also includes a memorandum from a member of the Texas House of Representatives which cites examples of the state legislature's failure to fund programs intended to benefit Mexican Americans and blacks. 1975 Senate Hearings at 920-21.

unconstitutional dual school systems.[115] Three of the six school districts now facing the loss of federal funds because of Title VI violations are in Texas.[116] Two-thirds of all Mexican American students in Texas attend predominantly Mexican American schools; 40% attend schools that are nearly all Mexican American.[117] Moreover, the amount of money spent in Texas to educate most Mexican American students is approximately 60% of that spent to educate whites.[118] The illiteracy rate for persons of Spanish origin in Texas is 33.8% compared to 8.6% for whites,[119] and 35.6% of Texas Mexican American families have incomes below the poverty level.[120]

Residential segregation is also widespread. In many towns and cities Mexican Americans "are not permitted to own property anywhere except in the Mexican 'colony,' regardless of their social, educational or economic

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[115] *See generally, Project Report: De jure Segregation of Chicanos in Texas Schools*, 7 Harv. Civil Rights-Civil Liberties L. Rev. 307 (1972). *See also Cisneros v. Corpus Christi Independent School District, supra*, n. 28.

[116] *N.Y. Times*, January 18, 1977 at A16.

[117] U.S. Commission on Civil Rights, "Ethnic Isolation of Mexican Americans in Public Schools of the Southwest," Report I at 60 (1970).

[118] United States Commission on Civil Rights, "Mexican American Education in Texas: A Function of Wealth," Report IV at 26 (1972).

[119] June 1975 CRC Memorandum at 4. Comparable figures for blacks in the South range from 18.4% in Virginia to 28.4% in Mississippi. 1975 House Hearings at 364, 369. The illiteracy rate for persons of Spanish origin in Texas is 14.4% higher than in any of the other Southwestern states. June 1975 CRC Memorandum at 4.

[120] 1975 Senate Hearings at 766. Approximately 40% of the blacks in Texas are living below the poverty level. 1975 House Hearings at 802.

status."[121] The housing that is available to Mexican Americans is generally inadequate. A 1966 study reported that 46.5% of the Mexican American families in Texas occupied overcrowded housing compared to 25.9% of the non-white and 9.4% of the white families.[122]

Mexican Americans have also suffered severe employment discrimination. During the 1940's, the majority of Texas industries discriminated against Mexican American workers with regard to employment, wage scales, and opportunities for promotion.[123] In 1959, Spanish surnamed males in the Southwest earned 57 cents for every dollar earned by whites.[124] Even today Mexican Americans are limited in employment and promotional opportunities by tests, seniority systems and other devices which perpetuate the results of past discrimination.[125]

Discrimination against Mexican Americans in the administration of justice is also well documented.[126] The Civil Rights Commission has reported severe police discrimination against Mexican Americans, and found that

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[121] P. Kibbe, *Latin Americans in Texas*, 123-24 (1946) (hereinafter Kibbe). *See also* J. Moore and F. Mittelbach, *Residential Segregation in the Urban Southwest* (Advance Report IV, Mexican American Study Project, UCLA Advance Report IV at 32, 38 (1966).

[122] F. Mittelbach and G. Marshall, *The Burden of Poverty*, Mexican American Study Project, UCLA Advance Report V at 44 (1966).

[123] Kibbe at 157.

[124] J. Moore, *Mexican Americans*, 60 (1970).

[125] *See, e.g., Sabala v. Western Gillette, Inc.*, 362 F.Supp. 1142 (S.D. Tex. 1973), *aff'd in relevant part*, 516 F.2d 1251 (5th Cir. 1975). *See also* Greenfield and Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 662, 718-23 (1975).

[126] *See generally* United States Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (1970).

in Nueces County, Texas, where Mexican Americans comprise over 40 percent of the population, of 288 grand jurors selected over a nine-year period only 16 were Mexican Americans.[127]

The elimination of economic, social, and other forms of discrimination in Texas depends, to a significant extent, on the elimination of discrimination against Mexican American and black voters. In *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966), this Court recognized that the Voting Rights Act helps minority citizens gain "nondiscriminatory treatment in public services," and thereby enables them "better to obtain 'perfect equality of civil rights and the equal protection of the law.'" Likewise, in *Robinson v. Commissioners Court, supra*, the Fifth Circuit affirmed the district court's findings that segregation of the county's public schools and other facilities, discrimination in county employment, and the Commissioners Court's general "unresponsiveness to the needs and interests of the black community" was a direct result of "oppressive and restrictive voting legislation and racial discrimination generally in the state of Texas." 505 F.2d at 679.[128] Once able to participate in the electoral process in a free and unimpaired manner, Mexican Americans and blacks in Texas will be in a position to insist that elected offi-

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[127] H. Rohan, *The Mexican American* 20 (1968) (Staff paper prepared for the United States Commission on Civil Rights). *See also* Kibbe, at 229. In *Hernandez v. Texas*, 347 U.S. 475 (1954), it was held that discrimination against Mexican Americans in the selection of grand jury panels violates the Fourteenth Amendment.

[128] *See also Cisneros v. Corpus Christi Independent School District, supra*, 324 F.Supp. at 604-05 n.27.

cials desegregate public school systems, enforce laws prohibiting discrimination in employment and housing, and take whatever action is necessary to eliminate discrimination by law enforcement and other public agencies.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for respondents, the decision below should be affirmed.

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February 25, 1977